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No. 86-1021-CFX
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Docketed:
December 23, 1986

Title: Carnegie-Mellon University, et al., Petitioners
v.
Maurice B. Cohill, Jr., Judge, United States District Court for the Western District of Pennsylvia, et al.

Court: United States Court of Appeals
for the Third Circuit

Counsel for petitioner: DeForest III, Walter P.

Counsel for respondent: Solicitor General, Opsitnick, Allan J.

Entry	Date	Note	Proceedings and Orders
1	Dec 23 1986	G	Petition for writ of certiorari filed.
2	Jan 23 1987	X	Brief of respondent William & Carrie Boyle in opposition filed.
3	Jan 28 1987		DISTRIBUTED. February 20, 1987
4	Feb 17 1987	X	Reply brief of petitioners Carnegie-Mellon Univ., et al. filed.
5	Feb 23 1987		Petition GRANTED.
			**
6	Apr 8 1987		Joint appendix filed.
7	Apr 8 1987		Brief of petitioners Carnegie-Mellon Univ., et al. filed.
9	Apr 23 1987		Order extending time to file brief of respondent on the merits until June 22, 1987.
10	May 7 1987		Record filed.
11	May 7 1987		Certified copy of appendix, briefs and partial proceedings received.
12	Jun 22 1987		Brief of respondent William & Carrie Boyle filed.
13	Jun 22 1987		Brief amicus curiae of California, et al. filed.
14	Jun 22 1987		Brief amicus curiae of Department of Water and Power filed.
15	Jun 29 1987		Record filed.
16	Jul 2 1987		CIRCULATED.
17	Aug 31 1987		SET FOR ARGUMENT. Tuesday, November 10, 1987. (3rd case).
18	Oct 29 1987	X	Reply brief of petitioners Carnegie-Mellon Univ., et al. filed.
19	Nov 10 1987		ARGUED.

PETITION FOR WRIT OF CERTIORARI

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Supreme Court, U.S.
FILED
DEC 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. ______

In the Supreme Court of the United States

October Term, 1986

CARNEGIE-MELLON UNIVERSITY
and JOHN KORDESICH,
Petitioners,

v.

HONORABLE MAURICE B. COHILL, JR.,
United States District Judge,
Nominal Respondent,

and

WILLIAM BOYLE and CARRIE BOYLE,
Respondents.

Petition For a Writ of Certiorari To the United States Court of Appeals For the Third Circuit

*WALTER P. DEFOREST III
W. THOMAS MCGOUGH, JR.
MARK A. FONTANA
REED SMITH SHAW & McCLAY
Mellon Square
435 Sixth Avenue
Pittsburgh, Pennsylvania 15219
(412) 288-3383

**Counsel of Record for Petitioners*

Counsel for Petitioners
Carnegie-Mellon University
and John Kordesich

65 Pl

QUESTION PRESENTED

Whether a district court has authority to remand a properly removed case to state court for a reason not set forth in 28 U.S.C. § 1447(c)--*i.e.*, elimination, by amendment of the complaint, of the federal claim that had formed the basis for removal--a question as to which the circuits are split and as to which the appellate court below, sitting in banc, was evenly divided.

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No. _______

In the
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October Term, 1986

CARNEGIE-MELLON UNIVERSITY
and JOHN KORDESICH,
Petitioners,

v.

HONORABLE MAURICE B. COHILL, JR.,
United States District Judge,
Nominal Respondent,

and

WILLIAM BOYLE and CARRIE BOYLE,
Respondents.

Petition For a Writ of Certiorari To the United States Court of Appeals For the Third Circuit

Carnegie-Mellon University ("C-MU") and John Kordesich, Petitioners,[1] respectfully pray that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on November 24, 1986. In that Order, the Third Circuit, sitting in banc upon rehearing, divided five to five and, accordingly, denied a petition for a writ of mandamus concerning the October 10, 1985 Opinion and Order of the United States District Court for the Western District of Pennsylvania which had permitted Respondents to voluntarily amend their complaint to delete the federal cause of action for age discrimination and directed the remand to state court of this case, although the district court found that this case had been removed properly and with jurisdiction under 28 U.S.C. § 1441(b).

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[1] C-MU has no parent company, affiliates, or subsidiaries, other than wholly-owned subsidiaries.

OPINIONS BELOW

The November 24, 1986 Order of the Third Circuit, sitting in banc, which denied the petition for the writ of mandamus because the Third Circuit was equally divided, is not officially reported and appears as Appendix A ("App. A") hereto. The August 29, 1986 Opinion of a panel of the Third Circuit, which had granted the petition for the writ of mandamus, is not officially reported but is unofficially reported at 41 FEP 1046 and appears as Appendix B ("App. B") hereto. The accompanying August 29, 1986 Order granting the petition for writ of mandamus and the August 29, 1986 writ of mandamus, itself, are not officially reported and appear as Appendix C ("App. C") and Appendix D ("App. D") respectively. The September 24, 1986 Order of the Third Circuit, granting Respondents' petition for rehearing in banc and vacating the panel opinion and the writ of mandamus, is not officially reported but is unofficially reported at 41 FEP 1888 and appears as Appendix E ("App. E") hereto. The October 10, 1985 Opinion and Order of the district court is not officially reported and appears as Appendix F ("App. F") hereto.

JURISDICTION

The Order of the Third Circuit, sitting in banc, upon rehearing, was entered on November 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are 28 U.S.C. § 1441 and 28 U.S.C. § 1447. 28 U.S.C. § 1441 provides:

> § 1441. Actions removable generally
>
> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.
>
> (c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.
>
> (d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of

this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

28 U.S.C. § 1447 provides:

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

STATEMENT OF THE CASE

William Boyle and Carrie Boyle, the plaintiffs below (collectively, the "Boyles"), commenced this action by filing a four count complaint against C-MU and Kordesich in the Court of Common Pleas of Allegheny County, Pennsylvania, on September 7, 1984.

The complaint alleged various causes of action including violation of federal and state age discrimination laws, wrongful discharge in tort, wrongful discharge as breach of contract, intentional infliction of emotional distress, defamation, misrepresentation, and tortious interference with a contractual and/or business relationship. The claims set forth in the complaint arose out of William Boyle's termination from employment with C-MU.

On September 21, 1984, C-MU and Kordesich removed the case to the United States District Court for the Western District of Pennsylvania. The bases for removal were the claims in paragraphs 13 and 14 of the complaint which alleged that William Boyle's termination by C-MU was based upon his age, 56, and "was therefore illegal and improper in violation of the laws of the United States of America and The Commonwealth of Pennsylvania" and that Boyle was also the victim of discrimination in not being rehired. Such claims thereby averred a cause of action subject to federal jurisdiction pursuant to 29 U.S.C. § 626(c)(1) of the federal Age Discrimination In Employment Act and 28 U.S.C. § 1331. The removal of the case was uncontested.

Following its removal, this case was actively litigated. An answer was filed. C-MU and Kordesich took the depositions of the Boyles. They also served and obtained responses to extensive requests for production of documents, deposed William Boyle's physician, and reviewed his medical records. C-MU and Kordesich responded to the Boyles' extensive document production requests and permitted them to review a significant amount of C-MU documents pursuant to those requests.

In the course of the pretrial proceedings, the Boyles had sought and obtained several extensions of the discovery period and the dates for filing pretrial narratives. The district court had originally set March 15, 1985, as the date of close of discovery, with April 5 and 26, 1985, as the dates for filing of the parties' respective pretrial narrative statements. On March 8, 1985, pursuant to the Boyles' motion, the district court granted an extension of the discovery period until May 14, 1985, with a corresponding extension in the dates of filing of pretrial narratives.[2]

On April 15, 1985, the Boyles filed a motion for leave to amend the complaint and a motion to remand with the district court. The Boyles sought leave to amend their complaint so that they could delete, *inter alia*, the federal age discrimination cause of action. In their motion to remand, the Boyles argued that the case was improvidently removed within the meaning of 28 U.S.C. § 1447(c) or, alternatively, that if they were permitted to amend the complaint and delete the federal age discrimination claim, the district court should exercise its discretion and remand the case. C-MU and Kordesich opposed both motions. In regard to the first motion, C-MU and Kordesich argued, *inter alia*, that any removal of such claims from this litigation should only be through a dismissal with prejudice (rather than mere voluntary withdrawal) so as to bar any later reinstitution of such claims by the Boyles. C-MU and Kordesich opposed a remand to the state court because it was not authorized under the controlling statute and because they objected to the Boyles' manipulation of the forum in which the case would be decided to the expense, delay and detriment of C-MU, Kordesich and the judicial system.

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[2] These dates were again extended by the district court pursuant to a second motion for enlargement of time by the Boyles, while their motion to remand and motion to amend the complaint were pending.

On October 10, 1985, the district court issued its Opinion and Order granting the Boyles' motion to amend the complaint, as well as their motion to remand the case to state court. App. F. Although the district court held that the case had not been removed improvidently and without jurisdiction, it nonetheless remanded the case for discretionary reasons not specified in the controlling statute. App. F. The district court noted that, by granting the Boyles' amendment, the case was reduced to one involving only state law claims. App. F, at 32a. The district court held that even though the state and federal claims had arisen out of "the same nucleus of operative facts," it would decline to exercise its jurisdiction over the state claims and would remand the case back to the state court. App. F, at 31a-32a.

The district court acknowledged that the "strong implication" of this Court's decision in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), was that district courts are limited by reasons provided in the governing statutes in remanding removed cases. App. F, at 33a. Nevertheless, the district court noted that there was a split among the various courts of appeals on this issue and elected to follow those courts of appeals which had permitted the remand of cases for discretionary reasons. App. F, at 33a-34a. The district court declined to certify the case for appeal, since it noted that the matter was reviewable under *Thermtron* by means of a petition for writ of mandamus. On November 5, 1985, C-MU and Kordesich filed a petition for writ of mandamus with the court of appeals. By Order dated December 20, 1985 (Appendix G), the court of appeals directed the Boyles to file an answer to the petition for writ of mandamus within twenty days, which they did.

By Order dated January 27, 1986, the court of appeals ordered that the case be referred to a merits panel, stating that "[t]his case presents a novel and important question of federal jurisdiction." Appendix H.

By Opinion and Order dated August 29, 1986, the merits panel granted the petition for writ of mandamus and directed the district court to vacate its remand order. Appendices B, C and D. The majority opinion of the merits panel held that there were two statutory provisions authorizing remand after removal, neither of which permitted remand here. App. B, p. 10a-11a. The panel majority held that 28 U.S.C. § 1441(c) did not provide a basis for remand because the state law claims were not "separate and independent" claims which could be remanded under 28 U.S.C. § 1441(c). The panel majority concurred with the district court's finding that the federal and state claims all arose out of a common nucleus of operative fact, *i.e.*, the circumstances of William Boyle's termination. App. B, at 11a-12a. The panel majority also held that the provisions of 28 U.S.C. § 1447(c) did not authorize remand because the case had not been removed improvidently and without jurisdiction. App. B, at 12a-13a. The panel majority, after noting the split among the circuit courts, held that this Court's decision in *Thermtron* was controlling and that remands may not be ordered on grounds not authorized by statute. App. B, at 13a-15a. The merits panel dissent did not dispute the absence of any statutory basis for the remand. Rather, the merits panel dissent held that, because the state claims could be dismissed without prejudice under this Court's decision in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), a district court should be permitted to remand them to state court. App. B, at 18a. The merits panel dissent relied upon those courts of appeals that had so held and stated that it believed that granting the district courts a power to remand was the best way to protect plaintiffs against statute of limitations problems. App. B, at 21a-23a. The dissent stated that it believed that Congress and this Court would have preferred this result if they had addressed this issue. App. B, at 19a-20a. The writ of mandamus was issued on August 29, 1986. App. D.

By Order dated September 24, 1986, the court of appeals granted the Boyles' petition for rehearing in banc and, accordingly, vacated the panel opinion of August 29, 1986, and the writ of mandamus. App. E. Argument on rehearing was held on November 13, 1986. By Order dated November 24, 1986, the court of appeals, being equally divided, denied the petition for writ of mandamus. App. A.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit's refusal to issue a writ of mandamus, when the district court admittedly remanded a case for a reason not provided in 28 U.S.C. § 1447(c), conflicts with decisions of other courts of appeals on this issue.

The issue of whether a district court may remand a properly removed case for reasons not authorized by 28 U.S.C. § 1447(c) has been the subject of considerable judicial interpretation. In *Thermtron*, 423 U.S. at 342, this Court held that: "Section 1446 provides the procedure for removal; and a case removed under that section may be remanded only in accordance with § 1447 . . ." (footnotes omitted).[3] In the present case, the district court acknowledged that remand was not authorized by the provisions of § 1447. App. F, at 31a. The reason stated by the district court for not following the *Thermtron* decision was that, while *Thermtron* involved a removal on the basis of diversity of citizenship, the present case was removed on the basis of a federal claim and, thus, involved pendent jurisdiction over the state law claims. While Petitioners do not agree with this purported distinction of *Thermtron*, the various courts of appeals have divided over the applicability of *Thermtron* beyond the specific factual situation involved there.

The Court of Appeals for the Sixth Circuit has interpreted *Thermtron* as being prompted by the "extreme circumstances of that case." *In re Romulus Community Schools*, 729 F.2d 431, 436 (6th Cir. 1984). In this decision, the Sixth Circuit stated: "If *Thermtron* was intended to eliminate all discretionary, nonstatutory grounds for remands, the decision has not uniformly had that effect. Indeed, the circuits are severely split over the question." 729 F.2d at 438. Notwithstanding the above-quoted language of this Court in the *Thermtron* decision, the Sixth Circuit held that district courts do have the power to remand cases where the plaintiff voluntarily amends the complaint to delete the federal claim. 729 F.2d at 440. The Sixth Circuit, after noting that *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), permits dismissal of state claims in certain circumstances, held that the district courts have the discretion to remand state claims, where deemed appropriate, even if the statutory requisites of 28 U.S.C. § 1447(c) have not been met. 729 F.2d at 439-40. The Sixth Circuit apparently concluded that if the district courts have the power to dismiss the state claims under *Gibbs*, they could remand them instead. 729 F.2d at 439-40. We discuss the flaws in this theory *infra* at 13-15.

The Fourth, Eighth and Second Circuits have also held that remands may be made for reasons not set forth in 28 U.S.C. § 1447(c). In *Fox v. Custis*, 712 F.2d 84, 89-90 (4th Cir. 1983) the Fourth Circuit held that the state claims should be remanded after the federal claim was dismissed (there involuntarily). *Hofbauer v. Northwestern Nat. Bank of Rochester*, 700 F.2d 1197, 1201 (8th Cir. 1983) was a similar holding. *Naylor v. Case & McGrath, Inc.*, 585 F.2d 557, 561-62 (2d Cir. 1978) held that state claims should be remanded even after a voluntary dismissal of federal claims. It is startling that none of these three decisions even discussed *Thermtron*.

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[3] In *Thermtron*, the district court had remanded a properly removed case because it determined that, due to a congested docket, an adjudication of the merits of the case would be expedited by remand. 423 U.S. at 339. The Sixth Circuit denied a petition for a writ of mandamus. *Id.* at 341-42. This Court granted a petition for a writ of certiorari and reversed the Sixth Circuit. *Id.* at 342.

On the other side of the conflict, the Seventh, Fifth and Tenth Circuits have held that remands are not proper unless made for reasons set forth in 28 U.S.C. § 1447(c). In *Cook v. Weber*, 698 F.2d 907, 909 (7th Cir. 1983), the Seventh Circuit held that remand of the state law claims is not permitted, notwithstanding even an involuntary dismissal of the federal claim that provided the basis for the removal.

The Seventh Circuit stated:

> Removal jurisdiction is based entirely on statutes, which are to be strictly construed in keeping with congressional intent to limit the right of removal out of concern for state courts' independent jurisdiction. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09, 61 S.Ct. 868, 872, 85 L.Ed. 1214 (1941); *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979). In keeping with and in effectuation of congressional policy as to removal we hold that the basis for remanding a removed case must be grounded on federal statutory authority.

698 F.2d at 909. In *Ryan v. State Board of Elections*, 661 F.2d 1130, 1133-34 (7th Cir. 1981), the Seventh Circuit held that remands are not permitted for discretionary reasons, such as abstention, which are not authorized by 28 U.S.C. § 1447(c).

In the case of *In re Greyhound Lines, Inc.*, 598 F.2d 883, 884-85 (5th Cir. 1979), the Fifth Circuit issued a writ of mandamus precluding a remand by the district court in a situation virtually identical to the present case, *i.e.*, where the plaintiff had voluntarily dismissed the federal claim and contemporaneously requested and obtained a remand of the state claims. In the case of *In re Shell Oil Co.*, 631 F.2d 1156, 1158 (5th Cir. 1980), a writ of mandamus was issued by the Fifth Circuit where a suit had been remanded for lack of opposition to the remand, citing *Thermtron* as permitting remands only in accordance with 28 U.S.C. § 1447.[4]

In *Sheet Metal Workers International Association v. Seay*, 693 F.2d 1000, 1002-06 (10th Cir. 1982), *modified on other grounds on reh'g*, 696 F.2d 780 (10th Cir. 1983), the Tenth Circuit also held that remands could not be granted for a reason not specified in 28 U.S.C. § 1447(c) (there the district court had remanded because the state court, which could provide more complete relief, was the more equitable forum).

Thus, the Third Circuit's refusal to issue a writ of mandamus here, where the district court candidly admitted (App. F at 31a-34a) that the remand was based upon a reason not provided for in 28 U.S.C. § 1447(c), directly conflicts with the decisions of the Seventh, Fifth and Tenth Circuits.

The merits panel dissent in this case concluded that "specific statutory authority is not necessary [to remand] and that this matter is governed by *United Mine Workers*

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[4] In *IMFC Professional Services, Inc. v. Latin American Home Health, Inc.*, 676 F.2d 152, 159-60 (5th Cir. 1982), a panel of the Fifth Circuit held that there was discretion to decline jurisdiction over claims against non-federal defendants once all claims against a federal defendant (which had provided the basis for removal) were dismissed, finding that the dismissal of the federal defendant made the case one "removed improvidently and without jurisdiction" and thus subject to remand under 28 U.S.C. § 1447(c). In a subsequent opinion, the Fifth Circuit indicated that *In re Greyhound Lines, Inc.*, is still good law. *Boelens v. Redman Homes, Inc.*, 759 F.2d 504, 507 n.2 (5th Cir. 1985).

v. Gibbs, 383 U.S. 715 (1966) rather than *Thermtron . . .*" App. B, at 18a. Under the Third Circuit's Orders subsequently vacating the panel majority opinion and denying the petition for a writ of mandamus, the district court is, in fact, being permitted to remand this case even though there is no statutory authority permitting such action. The Sixth Circuit's decision in *In re Romulus Community Schools, supra*, 729 F.2d at 436, also relied in part upon *Gibbs*.

However, there are a number of reasons why this Court's decision in *Gibbs* does not authorize remands absent statutory authority and does not undercut the clear import of *Thermtron*, which was decided ten years after *Gibbs*. First, it should be noted that *Gibbs* involved a situation where there had been an involuntary dismissal of the federal claims, not a tactical dismissal by the plaintiff as we have here. In fact, *Gibbs* reflects an abhorrence of the notion that a plaintiff could manipulate the forum.[5] Second, *Gibbs* did not involve a removed case. Removal jurisdiction is based entirely upon statutes which are to be strictly construed. *Cook*, 698 F.2d at 909, citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941). Third, *Gibbs* involved the dismissal of an action which is a power traditionally available to the district courts. *E.g.*, Fed. R. Civ. P. 12(b) and (h) and 41. There is no comparable traditional power in the federal courts to transfer or remand cases to the state courts. Fourth, remand of an action is not the functional equivalent of a dismissal. There are crucial distinctions between a remand and a

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[5]This Court in *Gibbs* noted that a plaintiff should not be permitted to "impose" upon the court a choice of forum by the nature of the pleadings (there the manipulation hypothesized was an attempt by a plaintiff to impose federal court jurisdiction by the shaping of the pleadings). 383 U.S. at 726-27.

dismissal, affecting, *inter alia*, the application of the statute of limitations, the priority of the case upon its return to state court, and even the right to and scope of appellate review of the district court's order. *Cook*, 698 F.2d at 908.

Thus, this Court's decision in *Gibbs* did not and could not create a power to remand a removed action, which is statutory in nature. In this regard, it should be noted that Congress could have easily provided, through statutory language, a power to remand in specific situations, such as where the federal claim was dismissed, or even could have provided a general discretionary power to remand. In fact, Congress chose to provide language in 28 U.S.C. § 1441(c) allowing remands at the district court's discretion in situations involving state claims separate and independent from the federal claims. However, no such discretionary language was provided in 28 U.S.C. § 1447(c). The Congressional judgment should be respected. A district court should not be permitted to remand a case for reasons other than those specified in the controlling statute. *Thermtron*, 423 U.S. at 342.

The eight circuits discussed above, which have specifically considered this issue, are badly divided. Four have held that the district courts can remand for reasons not specified in the controlling statute. Three circuits have held that such remands are improper. The Third Circuit has, itself, divided over this issue. Clearly, there should be a single answer to this question. Only this Court can resolve this direct conflict.

II. Whether a district court has the power to remand a properly removed action for reasons other than specified in the controlling statute is an important question of federal law that should be settled by this Court.

The question presented for review concerns the very jurisdiction of the federal courts and their powers. It raises the issue of whether the federal district courts have some general power, not dependent upon statute, to issue orders transferring cases to state courts, and whether that power exists even in removed cases where their jurisdiction is specially controlled by statute.[6]

The Third Circuit explicitly recognized that this case presented an "important question of federal jurisdiction." App. H. Unfortunately, the Third Circuit divided five to five and was unable to resolve the question. Thus, litigants and district courts in the Third Circuit are currently in a state of uncertainty as to a litigant's rights and a district court's powers in this area.

Moreover, the existence of an option in the district court to remand a case for non-statutory reasons will not deter and may well cause the inclusion of carelessly considered federal claims in state court complaints. Plaintiffs will realize that, if a case is removed to federal court, they can drop the federal claim and seek a remand, with a high level of confidence that it will be granted, because, after deletion of the federal claim, the state law claims will inevitably predominate, as was found here. Thus, the approach taken by the courts in the present case does not discourage the inclusion of poorly considered federal claims or the waste of resources of both litigants and the courts through needless removal and remand proceedings.

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[6] *Shamrock Oil & Gas Corp.*, 313 U.S. at 108-09.

The potential for jockeying and manipulation of forums by amendment of the complaint—which arises from a rule that permits remands for reasons not provided in the controlling statute—is also an important consideration that supports the review and reversal of the lower courts' orders in this case. This Court has previously recognized the importance of precluding the manipulation of the forum. In *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938), which concerned the predecessor to 28 U.S.C. § 1447, the Seventh Circuit had held that a district court should have remanded to state court a properly removed diversity case after the plaintiff filed a second amended complaint with an exhibit indicating that the plaintiff's damages were less than the requisite jurisdictional amount. 303 U.S. at 285.

This Court, in reversing the Seventh Circuit, held that:

> If the plaintiff could, no matter how *bona fide* his original claim in the state court, reduce the amount of his demand to defeat federal jurisdiction the defendant's supposed statutory right of removal would be subject to the plaintiff's caprice. The claim, whether well or ill founded in fact, fixes the right of the defendant to remove, and the plaintiff ought not to be able to defeat that right and bring the cause back to the state court at his election.

303 U.S. at 294. In the present case, the Boyles filed a motion to amend their complaint and a motion to remand wherein they explicitly requested a remand on the basis that their federal claim would be deleted by the amendment. This is the type of manipulation of the forum that *St. Paul Indemnity Co.* deplores and proscribes.

A district court's power to remand cases for reasons not specified in 28 U.S.C. § 1447(c) is neither an isolated nor a rarely occurring issue as established by the number of circuit court decisions on this issue cited hereinabove. This is understandable because a significant number of cases are removed to the federal district courts each year.[7]

Finally, the fact that a number of the courts of appeals have failed to heed the language of the *Thermtron* decision, in our view, makes this an important matter. The lower courts and litigants obviously need further direction from this Court upon the question of a district court's powers to remand cases.

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[7] For the twelve-month period ended June 30, 1985, there were 17,439 cases filed in the federal district courts as removals from state courts. 1985 Annual Report of the Director of the Administrative Office of the United States Courts at 136. This constituted 6.4 percent of the cases filed that year. *Id.* This percentage of new filings has remained relatively constant over the past ten years. *Id.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

*WALTER P. DEFOREST III
W. THOMAS MCGOUGH, JR.
MARK A. FONTANA

REED SMITH SHAW & McCLAY
Mellon Square
435 Sixth Avenue
Pittsburgh, Pennsylvania 15219
(412) 288-3383

Counsel for Petitioners
Carnegie-Mellon University
and John Kordesich

December 23, 1986

**Counsel of Record for Petitioners*

APPENDIX A

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 85-3619

CARNEGIE-MELLON UNIVERSITY
and JOHN KORDESICH,
Petitioners

vs.

HONORABLE MAURICE B. COHILL, JR.,
United States District Judge,
Nominal Respondent

and

WILLIAM BOYLE AND CARRIE BOYLE,
Respondents

(W.D. Pa. Civil No. 84-2285)

Argued
April 29, 1986

Before: SLOVITER and STAPLETON, *Circuit Judges*, and LONGOBARDI, *District Judge*.*

Argued In Banc
November 13, 1986

Before: ALDISERT, *Chief Judge*, and SEITZ, ADAMS, GIBBONS, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON and MANSMANN, *Circuit Judges*.

ORDER

The court in banc being equally divided, it is ORDERED AND ADJUDGED that the petition for a writ of mandamus be and is hereby denied.

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*Honorable Joseph J. Longobardi, United States District Judge for the District of Delaware, sitting by designation.

Each side to pay its own costs.

BY THE COURT,

ALDISERT

DATED: NOV 24, 1986 *Chief Judge*

APPENDIX B

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 85-3619

CARNEGIE-MELLON UNIVERSITY
and JOHN KORDESICH,
Petitioners

v.

HONORABLE MAURICE B. COHILL, JR.,
United States District Judge,
Nominal Respondent

and

WILLIAM BOYLE and CARRIE BOYLE,
Respondents

ON PETITION FOR WRIT OF MANDAMUS
ORIGINAL PROCEEDING
(RELATED TO W.D. CIVIL NO. 84-2285)

Argued April 29, 1986

Before: SLOVITER and STAPLETON, *Circuit Judges*, and LONGOBARDI, *District Judge*[*]

(Opinion filed August 29, 1986)

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[*] Hon. Joseph J. Longobardi, United States District Court for the District of Delaware, sitting by designation.

Walter P. DeForest (Argued)
Mark A. Fontana
Reed, Smith, Shaw & McClay
Pittsburgh, PA 15219

Attorneys for Petitioners

Allan J. Opsitnick (Argued)
Hickton & Opsitnick
Pittsburgh, PA 15219

Attorney for Respondents

OPINION OF THE COURT

SLOVITER, *Circuit Judge.*

This petition for mandamus requires us to decide whether the district court has the power to remand to state court a properly removed action after the complaint has been amended to delete all federal claims.

I.

Facts and Procedural History

The facts in this case are briefly stated. William and Carrie Boyle initiated this action in the Court of Common Pleas of Allegheny County, Pennsylvania, against Carnegie-Mellon University and John Kordesich, an employee of Carnegie-Mellon, complaining of the termination of William Boyle's employment. The complaint alleges William Boyle was discharged because he refused to accept blame or guilt in connection with improper billings and certain thefts at the University.

In the complaint, William Boyle alleged causes of action against Carnegie-Mellon for wrongful discharge in

tort, intentional infliction of emotional distress, defamation, misrepresentation, and breach of express and implied contracts. The complaint also alleges many of these same causes of action against Kordesich, who was William Boyle's supervisor at Carnegie-Mellon. Carrie Boyle brought suit against Carnegie-Mellon and Kordesich for loss of consortium, loss of companionship, loss of her husband's household services and "income expectancy", and "loss of life's pleasures."

In addition to the Boyles' state law claims, Count I of the complaint, titled "William S. Boyle vs. Carnegie Mellon University—In Trespass," contains the following language:

> Said termination [of Boyle's employment] was also based upon Boyle's age, 56, and was therefore illegal and improper in violation of the laws of the United States of America and the Commonwealth of Pennsylvania.

App. at 7a. No other portion of the complaint elaborates on this claim or makes any further reference to federal law, and it appears the parties are not diverse.

Based on the reference to age discrimination, Carnegie-Mellon and Kordesich (hereafter referred to collectively as Carnegie-Mellon) removed the case on September 21, 1984 to the federal District Court for the Western District of Pennsylvania. The Boyles did not contest removal or move to remand.

On April 15, 1985, after a period of discovery, which was extended by the district court at the Boyles' request, the Boyles moved to amend their complaint to delete the causes of action for age discrimination and defamation and the request for damages for loss of consortium. The

Boyles gave as the reason for the proposed amendment that "certain causes of action alleged . . . are not tenable and [they] feel that it would be highly unlikely that they would succeed." App. at 70a-71a. In discovery, it was disclosed that William Boyle had never filed any age discrimination charge with a federal or state agency, a prerequisite for suit under the Age Discrimination in Employment Act. *See* 29 U.S.C. §§ 626(d), 633(b).

At the same time as the motion to amend, the Boyles filed a motion to remand the case to state court because it would no longer contain any federal causes of action. The district court granted the motion to amend the complaint without discussion, and Carnegie-Mellon has not challenged this ruling. The court then ordered remand to the Pennsylvania state court. The court recognized that neither 28 U.S.C. § 1447(c) nor 28 U.S.C. § 1441(c), the two statutory provisions authorizing remand, were applicable in this case. It nonetheless held that because it had the discretion to dismiss an action from which all federal claims had been deleted, it also had the discretion to remand a case under like circumstances.

Carnegie-Mellon appealed this decision and also filed a petition for mandamus against the district judge, Chief Judge Cohill, who is the nominal respondent here. Appeals from remand orders are barred with an exception not applicable here. 28 U.S.C. § 1447(d), and the appeal was accordingly dismissed. The issue of mandamus is now before us.

II.

Mandamus Jurisdiction

We consider first whether mandamus is an available vehicle to challenge the remand. The Boyles argue that even if the district court committed error, it is not of the "magnitude" to justify issuance of a Writ of Mandamus.

Mandamus is, of course, not to be used as a substitute for appeal, or to thwart the strong congressional policy against piecemeal appeals. *Parr v. United States,* 351 U.S. 513, 520-21 (1956). The writ, however, is "appropriately issued . . . when there is 'usurpation of judicial power' or a clear abuse of discretion." *Schlagenhauf v. Holder,* 379 U.S. 104, 110 (1964) (quoting *Bankers Life & Casualty Co. v. Holland,* 346 U.S. 379, 383 (1953)). One of its principal uses is, as in this case, to confine federal courts to the proper exercise of their limited statutory jurisdiction. *See, e.g., Hoffman v. Blaski,* 363 U.S. 335 (1960).

The Supreme Court has made clear that "[a]bsent statutory prohibitions, when a remand order is challenged by a petition for mandamus in an appellate court, 'the power of the court to issue the mandamus would be undoubted.' " *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336, 353 (1976) (quoting *In re Pennsylvania Co.,* 137 U.S. 451, 453 (1890)). The *Thermtron* Court further stated that mandamus is available "where the district court . . . has remanded [a case] on grounds not authorized by the removal statutes." *Thermtron,* 423 U.S. at 353; *accord Levy v. Weissman,* 671 F.2d 766, 768-69 (3d Cir. 1982). This is precisely the situation presented in this case, and, therefore, mandamus is available to Carnegie-Mellon to challenge the remand order.

III.

Discussion

A. The District Court's Jurisdiction

In deciding whether the district court had authority to remand this case to state court, we must first determine whether the district court had subject matter jurisdiction over the action at all in the first instance. All parties have treated the assertion in the Boyles' complaint that William Boyle's discharge violated federal age discrimination laws as an attempt to state a claim under the federal Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1982) (ADEA). Thus, removal here was pursuant to 28 U.S.C. § 1441(b), which allows for removal of civil actions over which "the district courts have original jurisdiction founded on a claim or right under the Constitution, treaties or laws of the United States."

It has been an idiosyncrasy of federal jurisdiction that even if an action could have been filed originally in a federal court, that court does not have jurisdiction over a removed case if the state court from which it was removed did not also have jurisdiction. *See Lambert Run Coal Co. v. Baltimore & Ohio Railroad Co.*, 258 U.S. 377, 382 (1922); 1A J. Moore & B. Ringle, *Moore's Federal Practice* § 0.157[3.-1] at 55-56 (2d ed. 1986). This rule stems from the derivative nature of removal jurisdiction.

Recently, Congress has sensibly changed this anomalous situation by providing the following addition to 28 U.S.C. § 1441:

> (e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

Judicial Improvements Act of 1985, Pub. L. No. 99-336 § 3, 100 Stat. 633 (1986). This amendment applies only to actions filed in state court after the date of its enactment, and thus in this case we must still determine if jurisdiction under the ADEA is exclusive to federal courts. If so, the Pennsylvania court did not have jurisdiction over this claim, and the district court could not have derived jurisdiction on removal.

The district court analogized jurisdiction under the ADEA to jurisdiction under Title VII of the Civil Rights Act of 1964, and concluded that although the courts are divided over whether jurisdiction under Title VII was exclusive to federal courts, the better view was that Title VII jurisdiction was concurrent in state and federal courts. We need not decide if the Title VII analysis is correct because the question is more easily resolved by reference to the language of the ADEA. The ADEA provides that any person may bring an action for legal or equitable relief "in any court of competent jurisdiction." 29 U.S.C. § 626(c)(1). In addition, the provision of the Fair Labor Standards Act, 29 U.S.C. § 216(b), which provides that an action may be maintained "in any Federal or State court of competent jurisdiction"[1] is incorporated into the ADEA. 29 U.S.C. § 626(b).

These provisions signify that Congress intended both state and federal courts to have jurisdiction over suits brought under the ADEA. The statutory language is clear and nothing in the legislative history is to the contrary.

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[1] We note that by contrast, Title VII provides only that "[e]ach United States District Court . . . shall have jurisdiction of actions brought under" the Act, 42 U.S.C. § 2000e-5(f)(3).

This conclusion is in accord with the few federal cases we have found that have considered this question. *See Baldwin v. Sears, Roebuck & Co.*, 667 F.2d 458, 460-61 (5th Cir. 1982); *Jacobi v. High Point Label, Inc.*, 442 F. Supp. 518, 519-20 (M.D.N.C. 1977). We hold, therefore, that because the Pennsylvania court had jurisdiction over the ADEA claim, the Boyles' action was properly removed from state to federal court.

B. Propriety of Remand

Once the district court granted the Boyles' motion to amend their complaint to remove the ADEA claim, only state law claims remained. The district court decided that although these claims arose out of "the same nucleus of operative facts" as the federal claim, this was not an appropriate case to exercise pendent jurisdiction pursuant to *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725-27 (1966). This would ordinarily have entailed dismissal of the action without prejudice to the Boyles' right to refile their claim in state court. *Id.*

Here, because the case originally had been removed from state court, the district court decided to remand. The court acknowledged that no statute authorized the remand and that the Supreme Court's decision in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), seemed, in fact, to foreclose it, but it concluded that *Thermtron* was distinguishable. Carnegie-Mellon argues that *Thermtron* and this court's decision in *Levy v. Weissman*, 671 F.2d 766 (3d Cir. 1982), preclude a district court from remanding on the basis of grounds not specified in the controlling statute.

There are two statutory provisions authorizing remand after removal. The district court held that neither

authorized remand in this case, and we agree. The first, 28 U.S.C. § 1441(c), gives district courts discretion to remand "separate and independent" nonremovable claims or causes of action when those claims are joined with a removable claim.[2] The district court correctly found that Boyles' claims all arose out of a common nucleus of operative fact and thus that the claims in this case were not "separate and independent" for purposes of 28 U.S.C. § 1441(c). This conclusion follows from the leading Supreme Court decision interpreting this provision, *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951). The Court held that,

> where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441(c).

Id. at 14. Thus, § 1441(c), as interpreted in *Finn*, is intended to apply to situations where the various claims in a single complaint arise from different factual bases.

The application of the *Finn* rule has caused some difficulty, *see* 14A C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3724 at 366 (2d ed. 1985), but a straightforward application of the rule demonstrates that § 1441(c) does not provide a basis for remand in this case. All the Boyles' claims arise from William Boyle's termination by Carnegie-Mellon. This is indisputably a "single wrong", and, therefore, § 1441(c) does not provide a basis to remand.

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[2] 28 U.S.C. § 1441(c) provides in full:

> (c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

The second provision, 28 U.S.C. § 1447(c), requires remand if the district court finds "that the case was removed improvidently and without jurisdiction."[3] Although the terms "improvidently" and "without jurisdiction" are joined conjunctively, many decisions treat them as independent grounds for remand. *See, e.g., Ryan v. State Board of Elections of State of Illinois,* 661 F.2d 1130, 1133 (7th Cir. 1981). "Improvidently" generally refers to failure of the removing party to satisfy a statutory, nonjurisdictional requirement for removal, such as posting of a bond or removing within 30 days of the service of the initial pleading. *See, e.g., In re Merrimack Mutual Fire Insurance Co.,* 587 F.2d 642, 645-47 & nn. 3 & 8 (5th Cir. 1978). This term in the statute does not vest the district court with discretion to remand a properly removed case. *See IMFC Professional Services of Florida, Inc. v. Latin American Home Health, Inc.,* 676 F.2d 152, 159 n.14 (5th Cir. 1982). Similarly, the term "without jurisdiction" clearly refers to situations in which the district court is lacking jurisdiction over the removed case.

Neither of these provisions is applicable in this case. The removal of the Boyles' action was not legally defective in any way that the parties have identified or that we have been able to discern, and there are no discernible jurisdictional defects. Thus, we are squarely confronted with the issue whether the district court has discretion to remand a properly removed case.

In *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336 (1976), the Court held that a district judge erred as a matter of law in remanding a properly removed case to state court because his docket was overcrowded. *Id.* at 344-45. The Court criticized the district court's action in strong terms, stating that,

> an otherwise properly removed action may no more be remanded because the district court considers itself too busy to try it than an action properly filed in the federal court in the first instance may be dismissed or referred to state courts for such reason.

Id. at 344. In reaching this conclusion, the Court stated: "The District Court exceeded its authority in remanding on grounds not permitted by the controlling statute." *Id.* at 345. In a footnote, the Court added:

> Lower federal courts have uniformly held that cases properly removed from state to federal court within the federal court's jurisdiction may not be remanded for discretionary reasons not authorized by the controlling statute.

Id. at 345 n.9 (citations omitted). Finally, in holding that mandamus was available to redress the district court's action, the Court stated:

> we are not convinced that Congress ever intended to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute.

Id. at 351.

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[3] 28 U.S.C. § 1447(c) provides:

> (c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

Interpretation of *Thermtron* has divided the Courts of Appeals. The Seventh Circuit has held that *Thermtron* imposes a rigid rule limiting remand to those grounds specified in the statutes. *See Ryan v. State Board of Elections*, 661 F.2d 1130, 1133-34 (7th Cir. 1981); *see also Cook v. Weber*, 698 F.2d 907, 909-10 (7th Cir. 1983). In a slightly different context, the Tenth Circuit has come to the same conclusion. *See Sheet Metal Workers International Association v. Seay*, 693 F.2d 1000 (10th Cir. 1982). Early post-*Thermtron* cases in the Fifth Circuit suggested that the court viewed *Thermtron* as laying down a hard and fast rule against non-statutory remand. *See In re Greyhound Lines, Inc.*, 598 F.2d 883, 885 (5th Cir. 1979); *In re Merrimack Mutual Fire Insurance Co.*, 587 F.2d 642 (5th Cir. 1978). *But see IMFC Professional Services of Florida, Inc. v. Latin American Home Health, Inc.*, 676 F.2d 152, 159-60 (5th Cir. 1982).

On the other hand, the Sixth Circuit has squarely held, on facts analogous to those presented here, that the district courts have discretion to remand a properly removed action when the federal causes of action have been removed from the complaint. *See In re Romulus Community Schools*, 729 F.2d 431 (6th Cir. 1984). Other circuits have come to similar results, but without discussing or even citing to *Thermtron*. *See Fox v. Custis*, 712 F.2d 84, 89-90 & n.4 (4th Cir. 1983); *Hofbauer v. Northwestern National Bank of Rochester*, 700 F.2d 1197, 1201 (8th Cir. 1983); *Naylor v. Case & McGrath, Inc.*, 585 F.2d 557, 561-63 (2d Cir. 1978).

This court followed *Thermtron* in *Levy v. Weissman*, 671 F.2d 766 (3d Cir. 1982). Defendant in a properly removed action failed to comply with a local district court rule that required pro se litigants to file an address within

the district where documents could be served. Defendant's motion challenging the constitutionality of this rule was denied, and after defendant failed to comply with the court's order, the court remanded the case to state court as a sanction. We granted defendant's petition for mandamus and, relying on *Thermtron*, stated the applicable law as follows:

> Where a case has not been removed improvidently or where subject matter jurisdiction exists, remand is inappropriate and a federal trial court has no jurisdiction to enter a remand order.

Id. at 768 (footnote omitted).

The holdings in *Thermtron* and *Levy* that remand may not be ordered on grounds not authorized by statute control our decision today. The district court was instead persuaded by the Sixth Circuit view that the Supreme Court's "forceful pronouncement in *Thermtron* against remands unauthorized by statute were prompted by the extreme circumstances of that case." *In re Romulus Community Schools*, 729 F.2d at 436. No language in *Thermtron* limits the Court's holding to the particular circumstances of that case.

With respect, we reject the reasoning of the *Romulus* court and Judge Stapleton that because pendent jurisdiction as construed in *Gibbs* affords clear authority for dismissal of a case in which all federal claims have been dropped, the district court may instead remand the remaining state claims to state court. *Id.* at 436-40. We are not as "confident" as Judge Stapleton in predicting how the Supreme Court would have decided *Gibbs* had the case arisen in a removal context. Instead of depending on such prescience, we rely on what that Court stated in *Thermtron* ten years after *Gibbs*. What it stated is directly applicable here.

Moreover, the *Thermtron* Court's holding is merely an application of the fundamental constitutional principle that the jurisdiction of the inferior federal courts is dependent upon specific statutory authorization. Although the *Romulus* court and Judge Stapleton base their position on plausible policy reasons, primarily to insure a state forum for state claims, we believe those reasons are best addressed to Congress.

If we were to hold that federal courts may remand cases to state courts for reasons not specified in federal statutes, we would nullify Congress' effort to delineate the narrow circumstances in which remand is to be permitted. We would also frustrate Congress' purpose in providing a right of removal, since a defendant who exercises that right might thereafter be subject to duplicative and costly subsequent state proceedings. *See Cook v. Weber*, 698 F.2d at 909. Furthermore, allowing plaintiffs to obtain remands by dropping their federal claims could encourage manipulative and strategic remands. Indeed, in this case, Carnegie-Mellon suggests that the amendment and remand was sought because, after much effort and expense to it, the case was now ripe for summary judgment or trial.

Finally, if the district court can remand solely as a matter of its discretion, as distinguished from pursuant to narrowly drawn statutory authority, there will be no effective boundaries to the exercise of its discretion. "The writ of mandamus is not to be used when 'the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction.'" *See Schlagenhauf v. Holder*, 379 U.S. 104, 112 (1964) (quoting *Parr v. United States*, 351 U.S. 513, 520 (1956)).

We recognize that a most compelling case for a remand is presented when the state claims of an innocent plaintiff will be barred by the running of the statute of limitations. The Seventh Circuit has suggested that the district courts will not be without recourse if they cannot remand since they may, in appropriate cases, retain the case or dismiss with or without prejudice. *Cook v. Weber*, 698 F.2d at 909. *But see Tully v. Mott Supermarkets, Inc.*, 540 F.2d 187, 195-96 (3d Cir. 1976) (when only pendent claims remain pretrial, "court should ordinarily refrain from exercising jurisdiction in the absence of extraordinary circumstances"). Moreover, as Judge Stapleton acknowledges, there is no limitations problem where a state has a savings clause that would cover this situation. The serious limitations problem that he gives for encouraging us to act where Congress has not yet chosen to can be readily ameliorated by enactment of such clauses by the remaining states. In any event, even if we were convinced that the policies supporting discretion in the district court to remand outweigh those militating against it, we would still not be free to deviate from the rule of law laid down in *Thermtron* and *Levy v. Weissman*.

We will therefore grant Carnegie-Mellon's petition for mandamus and direct the district court to vacate its remand order.[4]

STAPLETON, *Cricuit Judge*, Dissenting:

The court today holds that a federal district judge is powerless to remand a case to the state court from which it came even though he or she has properly determined that the case should not continue in a federal forum because only state claims between non-diverse parties remain to be litigated. This result is said to be mandated by the Supreme Court's *Thermtron* decision and our *Levy* decision and by the fact that there is no specific statutory authority for such a remand. Because I conclude that specific statutory authority is not necessary and that this matter is governed by *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) rather than *Thermtron* and *Levy*, I respectfully dissent.

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[4] The district court will be free on remand to redetermine the appropriate disposition of the pendent claims.

When a federal judge in a suit between citizens of the same state entertains a state law claim related to a federal one, he exercises what we have come to call pendent jurisdiction. When and how pendent jurisdiction will be exercised is a matter of trial court discretion. *Gibbs*, 383 U.S. at 725. That discretion is to be exercised based upon such considerations as "judicial economy, convenience, and fairness to the litigants" as well as upon comity and the desirability of avoiding unnecessary federal adjudication of state law issues. 383 U.S. at 725-26.

These principles governing the exercise of pendent jurisdiction have been developed by the Supreme Court and Congress has seen fit to entrust the development of this area of the law to the courts. The judge who looks for statutory guidance on when and how to exercise pendent jurisdiction will thus look in vain.

In *Gibbs*, the Supreme Court instructed federal trial judges to monitor cases involving pendent claims throughout the life of those cases to ensure that a federal court remains the appropriate forum for resolving these claims. It specifically advised that, absent unusual circumstances, "if the federal claims are dismissed before trial, . . . the state claims should be dismissed as well . . . and left for resolution to state tribunals." 383 U.S. at 726-27. The Supreme Court cited no statute or rule of court as authority for the proposition that dismissal of the state claims was appropriate. Indeed, there is no statute or rule of court specifically authorizing dismissal of a case in which the Court has jurisdiction over the parties and the subject matter, the plaintiff is not in default, and the plaintiff's claim has not been shown to be deficiently pleaded or without merit.

When the Supreme Court in *Gibbs* turned from the issue of *when* the exercise of federal pendent jurisdiction should cease to the issue of *how* a decision to cease should be implemented, it instructed that the dismissal of the state-law claims be *without*, rather than *with*, prejudice. This choice was informed, not by a statutory provision or rule, but by the same considerations which the Court had previously spelled out as governing the exercise of pendent jurisdiction. Based on considerations of comity and the desirability of preserving the state law issues for resolution by a state tribunal, the Court's choice of dismissal without prejudice was obvious.

The *Gibbs* case had not been removed from a state court; accordingly, a remand was not an option for the Court in that case. If *Gibbs* had involved a removed case, however, I am confident that the Supreme Court would have done exactly what the district court did in this case. It would have considered the three available options - dismissal with prejudice, dismissal without prejudice, and remand - in light of the principles which govern the exercise of pendent jurisdiction. I believe it would have concluded, as the district court did here, that where the justification for refusing to decide a pendent claim in a removed case is that the issues involved are better resolved by a state tribunal, a remand more efficiently serves the desired objective than does either of the other alternatives.

Given the absence of statutory law relating to the exercise of pendent jurisdiction generally, it is not surprising that Congress has not expressly addressed the subject of remand in the context of a case in which an exercise of pendent jurisdiction has been found to be no longer appropriate. However, one can infer from what Congress has declared that it would prefer the common sense result of a remand in this case. In Section 1441(c) of Title 28, Congress addresses the situation in which a removable claim over which a federal district court would have original jurisdiction is joined with one or more unrelated state claims which would not otherwise be removable. It provides:

> (c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

28 U.S.C. § 1441(c).

Section 1441(c) is not applicable to this case because the Boyles' state and federal claims arose from the same nucleus of operative facts and therefore are not "separate and independent." *See American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 14 (1951). Nevertheless, it reflects a Congressional policy similar to the one identified in*Gibbs*: If removed state claims ought not to go forward in a federal forum, the status quo should be restored so that these claims may be resolved by the state tribunal.

As earlier noted, the majority concludes that a dismissal rather than a remand is mandated not only by the absence of express statutory authority but also by *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1975) and *Levy v. Weissman*, 671 F.2d 766 (3d Cir. 1982). *Thermtron* and *Levy* both involve a principle that is fundamental to our jurisprudence, but which does not apply to the case at bar.

When Congress has established a right to have a claim adjudicated by a federal court, a federal court may not deny a party that right. In both *Thermtron* and *Levy* the plaintiff had a right to a federal adjudication of their claims before the court. The question presented was whether a federal court, in the exercise of its discretion, could nevertheless refuse to adjudicate those claims. There could, of course, be only one answer to this question. Denial of discretion to remand was necessary in order to vindicate the plaintiff's statutory right to have his claim heard in a federal forum.

As *Gibbs* makes clear, the parties to this action currently have no right to a federal forum. 383 U.S. at 725. Congress has not provided the plaintiff or the defendant with a right to have plaintiff's state claims heard in a federal court divorced from the federal claim. The district court, applying the principles laid down in *Gibbs*, found that it should not retain jurisdiction over these state claims. This crucial difference between the case at bar and *Thermtron* and *Levy* justifies a different approach in this case.

As the majority notes, a number of other circuit courts have not considered the issue before us to be controlled by *Thermtron* and have recognized that remand is the more direct, economical and otherwise desirable alternative. *See*

In re Romulus Community Schools, 729 F.2d 431, 435-40 (6th Cir. 1984); *Fox v. Custis,* 712 F.2d 84, 89 n.4 (4th Cir. 1983); *Hofbauer v. Northwestern National Bank of Rochester,* 700 F.2d 1197, 1201 (8th Cir. 1983); *IMFC Professional Services of Florida v. Latin American Home Health,* 676 F.2d 152, 160 (5th Cir. 1982); *Naylor v. Case & McGrath, Inc.,* 585 F.2d 557, 561-62 (2d Cir. 1978); *Ondis v. Barrows,* 538 F.2d 904, 908 (1st Cir. 1976). Several of these cases have recognized that in some circumstances a remand will be the only way to preserve claims that otherwise would be barred by limitations. Removed cases frequently remain pending in the federal court well past the limitations deadline. If for any reason a plaintiff's federal claim is found wanting after that deadline has passed, the majority's approach, in states without savings statutes, will cause the plaintiff to forfeit the right to have his state claims heard in any forum. The majority's suggestion that this unfortunate potential for forfeiture may be ameliorated by district courts' choosing to retain and decide state claims which would be forfeited on dismissal is hardly a satisfying answer to the problem. Why, one may ask, should federal courts be compelled to litigate claims which have been initiated by the plaintiff in a state court and which, under *Gibbs,* belong in a state court?

For me, the limitations problem is a far more serious one than those which the majority foresees resulting from permitting remands in cases of this kind. Fairness to litigants is one of the *Gibbs* factors and there is no reason to believe that district courts will be unable to protect against the manipulations which the majority fears. Moreover, while it is true that remand orders are less frequently subject to appellate review than dismissals without prejudice, this is not a cause for alarm. The lessons of *Gibbs* and *Thermtron* are clear enough to minimize the risk that a district court will erroneously remand to state courts despite the presence of a significant federal interest. For this reason, I regard the risk of meritorious claims being forfeited upon dismissal as too high a price to pay for automatic review of all cases of this kind.

I would hold that the district court committed no error and that mandamus is, accordingly, inappropriate.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts, G.M.C. Printing. Phila., Pa. 215-568-4264)

APPENDIX C

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 85-3619

CARNEGIE-MELLON UNIVERSITY
and JOHN KORDESICH,
Petitioners

vs.

HONORABLE MARUICE B. COHILL, JR.,
United States District Judge.
Nominal Respondent

and

WILLIAM BOYLE AND CARRIE BOYLE,
Respondents

Present: SLOVITER, STAPLETON, *Circuit Judges*, and LONGOBARDI, *District Judge**

ORDER

Upon consideration of the Petition for Wirt of Mandamus, Respondent's answer, the briefs of the petitioners and the respondents and after hearing oral argument by counsel April 29, 1986.

It is ORDERED, ADJUDGED and DECREED by this Court that the prayer of petitioners is hereby granted and the Clerk of this Court is directed to issue a writ of mandamus in accordance with the opinion of this Court.

Each party to bear its own costs.

DOLORES K. SLOVITER
August 29, 1986 *Circuit Judge*

---

*Honorable Joseph J. Longobardi, United States District Court for the District of Delaware, sitting by designation.

APPENDIX D

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 85-3619

CARNEGIE-MELLON UNIVERSITY
and JOHN KORDESICH,
Petitioners

vs.

HONORABLE MAURICE B. COHILL, JR.,
United States District Judge,
Nominal Respondent

and

WILLIAM BOYLE and CARRIE BOYLE,
Respondents

WRIT OF MANDAMUS

UNITED STATES OF AMERICA, THIRD JUDICIAL CIRCUIT: SS

To the Honorable Maurice B. Cohill, Chief Judge of the United States District Court for the Western District of Pennsylvania,

GREETINGS:

WHEREAS, the Honorable Maurice B. Cohill by order entered October 10, 1985, in W.D. Civil No. 84-2285 remanded that case to the Court of Common Pleas of Allegheny County, Pennsylvania from which it had been removed; and, WHEREAS, Carnegie-Mellon University and John Kordesich filed a petition for writ of mandamus from that order requesting this Court to direct the said Honorable Maurice B. Cohill to enter an order vacating the said October 10, 1985, order and to proceed with the case and in support of said petition the petitioners filed a brief on February 11, 1986, and a reply brief on March 5, 1986; and,

WHEREAS, the respondents filed a brief on February 25, 1986; and,

WHEREAS, this Court having heard oral argument by counsel April 29, 1986, and having rendered its opinion and the same being filed on this date, in which the Court having directed that the prayer of the petitioners for a writ of mandamus be granted; and

WHEREAS, the Court on this date has entered an order directing the Clerk of this Court to issue a writ of mandamus in accordance with its opinion;

NOW THEREFORE the Honorable Maurice B. Cohill is hereby REQUIRED and DIRECTED, immediately after receipt of this writ, and without unreasonable delays, to vacate the said order entered October 10, 1985.

FRANCIS R. MATYSIK

Dated: August 29, 1986

Acting Clerk, United States
Court of Appeals
for the Third Circuit

APPENDIX E

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 85-3619

CARNEGIE-MELLON UNIVERSITY
and JOHN KORDESICH,
Petitioners

v.

HONORABLE MAURICE B. COHILL, JR.,
United States District Judge,
Nominal Respondent

and

WILLIAM BOYLE and CARRIE BOYLE,
Respondents

(W.D. Civil No. 84-2285)

PRESENT: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON and MANSMANN, *Circuit Judges*.

ORDER

A majority of the active judges of the circuit in regular active service having voted for rehearing by the court in banc, it is hereby ORDERED that the petition for rehearing filed by William Boyle and Carrie Boyle in the above is granted.

It is Further ORDERED that the Clerk of this Court list the above case for rehearing before the Court in banc at the convenience of the Court; and

It is Further ORDERED that the opinion and writ of mandamus be and are hereby vacated.

BY THE COURT,

/s/ John J. Gibbons

Dated: September 24, 1986 Circuit Judge

APPENDIX F

In the United States District Court
For the Western District of Pennsylvania

WILLIAM BOYLE and
CARRIE BOYLE,
Plaintiffs,

v.

CARNEGIE-MELLON UNIVERSITY
and JOHN KORDESICH,
Defendants.

Civil Action
No. 84-2285

OPINION

COHILL, C.J.

Presently before us is Plaintiffs' Motion to Amend the Complaint, and, additionally, to remand this action to the Court of Common Pleas of Allegheny County, Pennsylvania.

This action was originally brought by Plaintiffs in state court, asserting claims for wrongful discharge, intentional infliction of emotional distress, defamation, misrepresentation, age discrimination, breach of contract, tortious interference with contractual relations, and loss of consortium. The Complaint alleges that Plaintiff, William Boyle, an employee of Carnegie Mellon University ("CMU"), was wrongfully discharged in connection with alleged improper billings and theft, and because of age discrimination. Complaint, ¶¶ 10-12,13. The Complaint also alleges "discrimination in rehiring." *Id.* ¶ 14.

Defendants removed the case to this Court, basing removal on "Plaintiffs' assertion of age discrimination" in violation of the laws of the United States of America." Complaint, ¶13. The Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621 *et seq.* prohibits such discrimination.

Plaintiffs have moved to dismiss from the complaint, by way of amendment, claims for defamation, age discrimination under both state and federal law, and interference with marital relations. Motion to Amend, ¶¶ 5,6. We will grant the motion.

Plaintiffs have, in addition, moved for remand of the remaining claims to state court, based on two arguments. First, Plaintiffs assert that remand is appropriate under 28 U.S.C. § 1447(c), providing for remand of cases improvidently removed. Alternatively, it would appear, Plaintiffs argue that where a narrowing of issues results in the dismissal of the sole federal claim after removal, the Court should exercise its discretion to remand the pendent state claims. Defendants oppose remand.

DISCUSSION

Improvident Removal

Removal jurisdiction is derivative in nature. "If the state court lacks jurisdiction of the subject matter or of the parties, the Federal court acquires none, although it might in a like suit, originally brought there, have had jurisdiction." *Lambert Run Coal Co. v. Baltimore & Ohio R.R.*, 258 U.S. 377, 382, 42 S.Ct. 349, 351, 66 L.Ed. 671 (1922). Whether removal was proper or "improvident" in the instant case depends on whether the ADEA is enforceable in state as well as federal courts. If a federal statute is enforceable in both state and federal courts, the action would clearly be removable under 28 U.S.C. § 1441(b).

In *Kremer Chemical Construction Corp.*, 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982), the Supreme Court left open the question of whether jurisdiction to entertain title VII cases is limited to federal courts. *Id.* at 479 n.20, 102 S.Ct. at 1896 n.20, 72 L.Ed.2d 262 (1982). The Court of Appeals for the Third Corcuit has not, to our knowledge, addressed this question. While courts have come to opposite conclusions on this question, we adopt the reasoning of those courts which have held that nothing in the language or structure of title VII mandates a conclusion that jurisdiction is exclusive. *See, e.g., Patzer v. Board of Regents*, 577 F.Supp. 1553, 1559 (W.D. Wis. 1984), *rev'd on other grounds*, 763 F.2d 851 (7th Cir. 1985); *Greene v. County School Board*, 524 F.Supp. 43, 44-45 (E.D. Va. 1981); *Bennum v. Board of Governors*, 413 F.Supp. 1274, 1280 (D.N.J. 1976). We believe this reasoning is equally persuasive in cases brought under the ADEA. *But see Dyer v. Greif Bros., Inc.*, 755 F.2d 1391, 1393 (9th Cir. 1985); *Valenzuela v. Kraft, Inc.*, 739 F.2d 434, 435-36 (9th Cir. 1984); *Dickinson v. Chrysler Corp.*, 456 F.Supp. 43, 45-48 (E.D. Mich. 1978). Thus, we hold that removal in this case was proper, and do not find section 1447(c) a proper ground for remanding the case.

Other Grounds for Remand

In the case at bar, the state and federal claims arise out of the same nucleus of operative facts. Thus, even after dismissal of the federal claim, (on motion of the Plaintiffs) we continue to have jurisdiction over the remaining state claims pursuant to the doctrine of pendent jurisdiction. *See In re Carter*, 618 F.2d 1093, 1104 (5th Cir. 1980) (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966)), *cert. denied sub nom. Sheet Metal Workers Int'l Ass'n v. Carter*, 450

U.S. 949, 101 S.Ct. 1410, 67 L.Ed.2d 378 (1981); *Naylor v. Case & McGrath*, 585 F.2d 557, 562 (2d Cir. 1978).

Pendent jurisdiction, however, is a doctrine of discretion. "Its justification lies in considerations of judicial economy, convenience, and fairness to the litigants. . . ." *Gibbs*, 383 U.S. at 726, 86 S.Ct. at 1139, 16 L.Ed.2d 218 (1966). The factors courts are to consider in deciding whether or not to exercise pendent jurisdiction are 1) whether the federal claims were dismissed before trial; 2) whether state claims predominate; 3) whether the state claims are closely tied to questions of federal policy; and 4) whether a jury is likely to be confused by divergent legal theories of relief. *Id.* at 726-27, 86 S.Ct. at 1139-40, 16 L.Ed.2d 218. In considering these factors in the case at bar, we find that state claims predominate; the present action is not at the point of trial, and that the state claims implicate no important questions of federal policy. Based on these considerations, we decline to exercise pendent jurisdiction.

Applying the *Gibbs* analysis, however, does not resolve the question of whether a federal court should dismiss or remand in such a case as this. As one court has stated, "[t]he issue can be of substantial importance; it affects the application of the statute of limitations, the priority of the case upon its return to the state court, and the reviewability of the district court's order itself." *Salveson v. Western States Bankcard Ass'n*, 525 F.Supp. 566, 581 n.17 (N.D. Calif. 1981), *aff'd in part, rev'd in part on other grounds*, 731 F.2d 1423 (9th Cir. 1984).

We recognize, of course, that remand is a creature of statute, provided for in 28 U.S.C. §§ 1441(c) and 1447(c). We have previously discussed the inapplicability of 1447(c) as authority for remanding this case, since it was properly removed. Section 1441(c) is also inapplicable

because it refers to "separate and independent" claims. It thus does not apply in a case where the claims arise out of a common nucleus of operative facts. *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 14, 71 S.Ct. 534, 540, 95 L.Ed. 702 (1951); *Salveson*, 525 F.Supp. 566, 580 n.17; C. Wright, *Law of Federal Courts*, § 39, at 219-25 (4th ed. 1983).

In *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976), the Supreme Court held that a district court had exceeded its authority in remanding a properly removed case because of docket congestion. 46 L.Ed.2d at 550. The strong implication of the Court's opinion was that district courts are limited by reasons provided in the governing statutes in remanding removed cases. *Accord, Levy v. Weissman*, 671 F.2d 766, 769 (3d Cir. 1982) (district court erred in remanding properly removed case as sanction for failure to comply with local rule; *Thermtron* prohibits remand for reasons not recognized by controlling statute). *See also Boelens v. Redman Homes, Inc.*, 759 F.2d 504, 507 n.[illegible] Cir. 1985); *Cook v. Weber*, 698 F.2d 907, 909 (7th Cir. 1983).

Since *Thermtron*, a significant number of appellate opinions have approved remand after dismissal of a federal claim, where, for discretionary reasons, a district court decides not to retain jurisdiction of pendent state claims. The leading case, *In re Romulus Community Schools*, 729 F.2d 431 (6th Cir. 1984) discusses these and conflicting cases. We find *Romulus* persuasive, and adopt its rationale in remanding the present case. *See also Kazor v. General Motors Corp.*, 585 F.Supp. 62 (E.D. Mich. 1984) for an excellent review of this issue which is consistent with our result. We also recognize that this decision may conflict with *Levy v. Weissman* (*supra*). However, we believe that remand is appropriate in situations involving pendent jurisdiction, and that the procedure has been approved by several courts of appeals. *See e.g., Fox v. Custis*, 712 F.2d 84, 89-90 (4th Cir. 1983); *Hofbauer v. Northwestern National Bank of Rochester*, 700 F.2d 1197, 1201 (8th Cir. 1983); *Brough v. United Steelworkers of America*, 437 F.2d 748, 750 (1st Cir. 1971). The question of remand in this situation was not addressed in *Levy*.

Since, under *Thermtron*, our order is appealable by petition for writ of mandamus, we need not certify the issue for appeal pursuant to 28 U.S.C. §1292(b).

An appropriate order will follow.

MAURICE B. COHILL, JR.
. . . .
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM BOYLE and
CARRIE BOYLE,
Plaintiffs,

v.

CARNEGIE-MELLON UNIVERSITY
and JOHN KORDESICH,
Defendants.

Civil Action
No. 84-2285

ORDER

AND NOW, to-wit, this 10th day of October, 1985, for the reasons stated in the foregoing opinion, it is hereby ORDERED, ADJUDGED and DECREED that

1) Plaintiffs' Motion to Amend the Complaint in the above-captioned matter be and hereby is GRANTED;

2) Plaintiffs' Motion to Remand be and hereby is GRANTED; the Clerk is directed to remand the above-captioned action to the Court of Common Pleas of Allegheny County forthwith.

MAURICE B. COHILL, JR.
. . . .
Chief Judge

cc: Allan J. Opsitnick, Esq.
Hickton & Opsitnick
527 Second Avenue
Pittsburgh, PA 15219

Walter P. DeForest, Esq.
Robert E. Sheeder, Esq.
Reed, Smith, Shaw & McClay
847 Two Mellon Bank Center
Pittsburgh, PA 15219

APPENDIX G

United States Court of Appeals

For The Third Circuit

No. 85-3619 November 7, 1985

CARNEGIE-MELLON UNIVERSITY and
JOHN KORDESICH, *Petitioners*

vs.

HON. MAURICE B. COHILL, JR., U.S.D.J.,
Nominal Respondent

and

WILLIAM BOYLE and CARRIE BOYLE, *Respondents*
(Related to W.D.Pa. Civil No. 84-2285)

Present: WEIS, SLOVITER and STAPLETON, *Circuit Judges.*

1. Petition for Writ of Mandamus *and* Appendix in support of petition,

in the above-entitled case.

Respectfully,
Denise Trottie
Deputy Clerk 7-1092

enc.
dt

Respondents Boyle et al are directed to file an answer to the petition for mandamus within 20 days of the date of this order.

By the Court,
Weis
Judge

Dated: December 20, 1985

dt/cc: (WPDeF, MAF)
AJO

APPENDIX H

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 85-3619

CARNEGIE-MELLON UNIVERSITY,
and JOHN KORDESICH,
Petitioners

v.

HONORABLE MAURICE B. COHILL, JR.,
United States District Judge,
Nominal Respondent

and

WILLIAM BOYLE AND CARRIE BOYLE,
Respondents

Related to (W.D. Pa. Civ. No. 84-2285)

Present: WEIS, SLOVITER and
STAPLETON,
Circuit Judges

ORDER

This case presents a novel and important question of federal jurisdiction. *See* 28 U.S.C. § 1441(c), 28 U.S.C. § 1447(c). *Thermatron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), *Levy v. Weissman*, 671 F.2d 766 (3d Cir. 1982), *In re Romulus Community Schools*, 729 F.2d 431 (6th Cir. 1984), *Fox v. Custis*, 712 F.2d 84 (4th Cir. 1983), *IMFC Professional Services of Florida, Inc. v. Latin American Home Health, Inc.*, 676 F.2d 152 (5th Cir. 1982), *Ryan v. State Bd. of Elections of State of Ill.*, 661 F.2d 1130 (7th Cir. 1981), *Cook v. Weber*, 698 F.2d 907 (7th Cir. 1983), *In re Greyhound Lines, Inc.*, 598 F.2d 883 (5th Cir. 1979). *See also* 42 Pa. Cons. Stat. Ann. § 5103 (Purdon Supp. 1985), *Weaver v. Marine Bank*, 683 F.2d 744 (3d Cir. 1982), *McLaughlin v. ARCO Polymers, Inc.*, 721 F.2d 426 (3d Cir. 1983).

Accordingly, it is ORDERED that this matter is referred to a merits panel. The Clerk of Court shall fix a briefing schedule.

BY THE COURT,

WEIS
....
Circuit Judge

DATED: January 27, 1986

dt/cc: (Walter P. DeForest, Esq.
(Mark A. Fontana, Esq.
Allan J. Opsitnick, Esq.
Hon. Maurice B. Cohill, Jr.

OPPOSITION
BRIEF

Supreme Court, U.S.
FILED
JAN 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

②

No. 86-1021

In the Supreme Court of the United States

October Term, 1986

CARNEGIE-MELLON UNIVERSITY
and JOHN KORDEISCH,
Petitioners,

v.

HONORABLE MAURICE B. COHILL, JR.,
United States District Judge,
Nominal Respondent,

and

WILLIAM BOYLE and CARRIE BOYLE,
Respondents.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

*ALLAN J. OPSITNICK
HICKTON & OPSITNICK
527 Court Place
Pittsburgh, PA 15219
(412) 471-1511

**Counsel for Respondents*

TABLE OF CITATIONS

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Sheet Metal Workers International Association v. Seay, 693 F.2d 1000 (1982), modified on other grounds on rehearing, 696 F.2d 780 (10th Cir. 1983) 4

Thermtron Products Inc. v. Hermansdorfer, 423 U.S. 336 (1976) 3

United Mine Workers v. Gibbs, 383 U.S. 715 (1966) 3

No. 86-1021

In the

Supreme Court of the United States

October Term, 1986

CARNEGIE-MELLON UNIVERSITY,
and JOHN KORDESICH,
Petitioners,
v.
HONORABLE MAURICE B. COHILL, JR.,
United States District Judge,
Nominal Respondent,
and
WILLIAM BOYLE and CARRIE BOYLE,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

I. INTRODUCTION

Respondents, William Boyle and Carrie Boyle (Boyle) are in substantial agreement with the Statement of the Case set forth by Petitioners. However, Petitioners attempt to create the inference that there was bad faith on the part of Boyle and that pre-trial discovery and other motions were virtually completed. This is untrue.

For the reasons set forth below, it is respectfully requested that this Honorable Court deny a Writ of Certiorari.

II. REASONS FOR DENYING THE WRIT

A. There is no conflict among Circuits regarding this issue of law.

There is no conflict among Circuits regarding this issue of law. The District Court, in its Order, utilized the doctrine of pendent jurisdiction as promulgated by this Honorable Court in United Mine Workers v. Gibbs, 383 U.S. 715 (1966), in a manner consistent with the holding of this Honorable Court in Thermtron Products, Inc., v. Hermansdorfer, 423 U.S. 336 (1976).

Petitioners indicate that remand of removed cases has been permitted in the Second, Fourth, Sixth, and Eighth Circuits, but has not been permitted in the Fifth, Seventh, and Tenth Circuits. This is untrue.

In the Fifth Circuit, remand of a removed case pursuant to pendent jurisdiction is permitted, In Re: Carter 618 F.2d 1093 (1980). Carter was cited before the Third Circuit for this very proposition, but has not been discussed or distinguished by Petitioners.

The Seventh Circuit cases of Cook v. Weber 698 F.2d 907 (1983) and Ryan v. State Board of Elections 661 F.2d 1130 (1981) are distinguishable in that remand had occurred without any authority. Cook and Ryan are not pendent jurisdiction cases.

Likewise, the Tenth Circuit case of Sheet Metal Workers International Association v. Seay 693 F.2d 1000 (1982), modified on other grounds on rehearing, 696 F.2d 780 (1983) is not a pendent jurisdiction case.

B. There is no important question of federal law.

There is no important question of federal law that requires attention by this Honorable Court. Because there is no conflict among circuits, there is no issue to be settled by this Honorable Court.

Assuming arguendo that there is an inter circuit conflict, the conflict is not of such a magnitude as to create an important question of federal law. This situation is a limited one and Petitioners' fear of "manipulation" of the federal court system is unfounded.

While it is clear that the remand to State Court in this case is not founded in statute, it is based on clear authority and, as such, is consistent with the abovementioned holdings of this Honorable Court and indicates that there is no conflict among circuits on this narrow point.

III. CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be denied.

Respectfully submitted,

*ALLAN J. OPSITNICK

HICKTON & OPSITNICK
527 Court Place
Pittsburgh, PA 15219
(412)471-1511

*Counsel for Respondents

January 28, 1987

REPLY
BRIEF

Supreme Court, U.S.
FILED
FEB 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-1021

In the Supreme Court of the United States

October Term, 1986

CARNEGIE-MELLON UNIVERSITY
and JOHN KORDESICH,
Petitioners,
v.
HONORABLE MAURICE B. COHILL, JR.,
United States District Judge,
Nominal Respondent,
and
WILLIAM BOYLE and CARRIE BOYLE,
Respondents.

**On Petition For a Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit**

PETITIONERS' REPLY BRIEF

*WALTER P. DEFOREST III
W. THOMAS MCGOUGH, JR.
MARK A. FONTANA
REED SMITH SHAW & McCLAY
Mellon Square
435 Sixth Avenue
Pittsburgh, Pennsylvania 15219
(412) 288-3383

*Counsel of Record for Petitioners

Counsel for Petitioners
Carnegie-Mellon University
and John Kordesich

+ pp

No. 86-1021

In the
Supreme Court of the United States

October Term, 1986

CARNEGIE-MELLON UNIVERSITY
and JOHN KORDESICH,
Petitioners,

v.

HONORABLE MAURICE B. COHILL, JR.,
United States District Judge,
Nominal Respondent,

and

WILLIAM BOYLE and CARRIE BOYLE,
Respondents.

**On Petition For a Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit**

Petitioners' Reply Brief

The Brief in Opposition to Petition for a Writ of Certiorari submitted by Respondents William Boyle and Carrie Boyle ("Brief in Opposition") asserts that there is no conflict among the Circuits regarding the issue presented for review. In addition to the discussion in the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit ("Petition") on this point, Petitioners simply note that both the Third Circuit majority opinion and the district court recognized the existence of this conflict in the Circuits over whether a district court has the authority to remand a properly removed case to state court for a reason not set forth in 28 U.S.C. § 1447(c). Petition App. B, at 14a; App. F, at 33a. Contrary to the assertion in the Brief in Opposition at 4, the Seventh Circuit's decision in *Cook v. Weber*, 698 F.2d 907, 909 (7th Cir. 1983), did involve the disposition of pendant state law claims. Moreover, the question presented by this case—whether a properly removed case may be remanded for a reason not specified in the controlling statute—is not limited to situations of pendent state law claims. The Fifth Circuit's decision in *In re Carter*, 618 F.2d 1093 (5th Cir. 1980), *cert. denied, sub nom., Sheet Metal Workers Int'l Ass'n v. Carter*, 450 U.S. 949 (1981), did not direct a remand of pendent state claims to the state court. The discussion at the conclusion of that opinion suggests that the district court's choice on remand from the Fifth Circuit was to either dismiss or retain the state law claims. 618 F.2d at 1105. In any event, as explained at pp. 12-13 and n.4 of the Petition, the Fifth Circuit's decision in *In re Greyhound Lines, Inc.*, 598 F.2d 883 (5th Cir. 1979), is still good law. *Boelens v. Redman Homes, Inc.*, 759 F.2d 504, 507 n.2 (5th Cir. 1985).

Further, the importance of this issue was acknowledged explicitly by the Third Circuit in its order accepting the matter for mandamus review of this issue. Petition App. H. It was also implicitly acknowledged by the eventual scheduling of this case for argument in banc by the Third Circuit. Petition App. E.

Respectfully submitted,

*WALTER P. DEFOREST III
W. THOMAS MCGOUGH, JR.
MARK A. FONTANA

REED SMITH SHAW & MCCLAY
Mellon Square
435 Sixth Avenue
Pittsburgh, Pennsylvania 15219
(412) 288-3383

Counsel for Petitioners
Carnegie-Mellon University
and John Kordesich

February 16, 1987

**Counsel of Record for Petitioners*

JOINT APPENDIX

Supreme Court, U.S.
FILED
APR 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

4

No. 86-1021

In the
Supreme Court of the United States

October Term, 1986

CARNEGIE-MELLON UNIVERSITY
and JOHN KORDESICH,
Petitioners,
v.
HONORABLE MAURICE B. COHILL, JR.,
United States District Judge,
Nominal Respondent,
and
WILLIAM BOYLE and CARRIE BOYLE,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

*ALLAN J. OPSITNICK
HICKTON & OPSITNICK
527 Court Place
Pittsburgh, PA 15219
(412) 471-1511
Counsel for Respondents

*WALTER P. DEFOREST III
MARK A. FONTANA
REED SMITH SHAW & McCLAY
Mellon Square
435 Sixth Avenue
Pittsburgh, PA 15219
(412) 288-3383
Counsel for Petitioners

**Counsel of Record*

PETITION FOR CERTIORARI FILED DECEMBER 23, 1986
CERTIORARI GRANTED FEBRUARY 23, 1987

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The following opinions, orders and writ of mandamus have been omitted in printing this Joint Appendix because they appear on the following pages of the Petition for Writ of Certiorari:

Opinion and Order of the United States District Court for the Western District of Pennsylvania in Civil Action No. 84-2285, dated October 10, 1985 . . . Pet. App. F, 29a

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Order of the United States Court of Appeals for the Third Circuit in No. 85-3619 directing Respondents to file an answer to the petition for mandamus, dated December 20, 1985 . . . . Pet. App. G, 37a

Order of the United States Court of Appeals for the Third Circuit in No. 85-3619 referring matter to merits panel and fixing a briefing schedule, dated January 27, 1986 . . . . Pet. App. H, 38a

Opinion of the United States Court of Appeals for the Third Circuit in No. 85-3619, dated August 29, 1986 . . . . Pet. App. B, 3a

Order of the United States Court of Appeals for the Third Circuit in No. 85-3619 directing the issuance of a writ of mandamus, dated August 29, 1986 . . . . Pet. App. C, 24a

Writ of Mandamus of the United States Court of Appeals for the Third Circuit in No. 85-3619, dated August 29, 1986 . . . . Pet. App. D, 25a

Order of the United States Court of Appeals for the Third Circuit in No. 85-3619 granting rehearing in banc, dated September 24, 1986 . . . . Pet. App. E, 27a

Order of the United States Court of Appeals for the Third Circuit in No. 85-3619 denying petition for writ of mandamus, dated November 24, 1986 . . . . Pet. App. A, 1a

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UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

William Boyle and Carrie Boyle

v.

Carnegie-Mellon University
and John Kordesich

Civil Action No. 84-2285

DATE	NR.	PROCEEDINGS
1984		
Sept 21	1	Notice and Petition for Removal from Court of Common Pleas filed by Carnegie-Mellon University and John Kordesich with copy of complaint; $250.00 removal bond filed—receipt No. 46992.
Oct 10	2	ANSWER filed by deft.
Oct 15	3	Not of Dep of William Boyle on 10/30/84 at 9:00 AM
Nov 14	4	Not of Pretrial Procedure stating Rule 5II is invoked; discovery ends 3/15/85; Pltfs pretrial due 4/5/85; defts pretrial due 4/26/85; stip of counsel 5/15/85
1985		
Mar 7	5	Notice and motion for enlargement of discovery period filed by pltfs with a proposed order.

Mar 8	6	Opposition by defts to pltfs motion for enlargement of discovery time filed.
Mar 7	w/5	Order entered directing that the parties are permitted to conduct discovery in this case for an add'l 60 days from 3-15-85; discovery shall end on 5-14-85; the date of the pretrial submissions of the parties and the stipulations of the parties shall be adjusted accordingly (Cohill, J.)
Apr 15	7	Notice and motion to remand from the U.S. District Court for the Western District of Penna to the court of Common Pleas of Allegheny County filed by pltfs with a proposed order.
Apr 15	8	Notice and motion for leave to amend complaint filed by pltfs with a proposed order.
May 2	9	Notice for motion for enlargement of time filed by pltfs with proposed order.
May 7	10	Deft's response in opposition to pltf's motion for enlargement of time filed.

May 8	w/9	Order entered directing that the parties shall complete discovery by 45 days from the date of deposition of pltfs motion for remand and motion for leave to amend complaint; pltfs pretrial shall be filed by 21 days from the date of discovery shall end; defts pretrial shall be filed by 21 days from the date pltfs pretrial is due and stipulation of counsel shall be filed by 21 days from the date defts pretrial is due. (Cohill, J.)
May 9	11	Stipulation filed with a proposed order.

May 9	w/11	Order entered directing that pltfs, any counsel for pltfs and any other individuals who are or become associated with the preparation of pltfs claims shall not disclose any of the information rec'd in discovery from defts or any personnel or representatives of defts, except for the sole purposes of the above captioned lawsuit and for no other purpose; defts and counsel for defts and any other individuals who are or become associated with the preparation or trial of deft's defense shall not disclose any information rec'd in discovery from pltfs or any representatives of pltfs, except for the sole purposes of if the above captioned lawsuit and for no other purposes; further pltfs and counsel for pltfs and any other individuals who are or become associated with the preparation or trial of pltfs claim shall return to counsel for defts all records, files and documents rec'd in discovery from defts or any personnel or representatives of defts. (Cohill, J.)
Oct 10	12	Opinion filed and order entered that Pltfs' motion to amend complaint is granted; Pltf's motion to remand be and hereby is granted; the clerk is directed to remand the case to the Court of Common Pleas of Allegheny County forthwith COHILL, J.

Oct 10	—	Pursuant to order entered this case is hereby remanded to Ct. of Common Pleas of Alleg. County, and mot. to amend complaint is granted. Gilbert W. Conley, Clerk
Oct 10	—	Notices mailed.
Oct 10	—	Transmittal letter and CC of order sent to John P. Joyce, Prothonotary of Alleg. County Ct.
Nov 1	13	Notice of appeal filed by deft from order dated 10-10-85. (USCA $65.00-CA $5.00 paid)
Nov 1	—	Cc of notice of appeal, cc of order dated 10-10-85, cc of docket entries mailed to the U.S. Ct. of Appeals; copy of notice to Judge Cohill, No Ct. Reporter.
Nov 6	14	Transcript purchase order filed by appellants advising that a transcript is not need; statement of the issues attached thereto.
Nov 6	—	Record complete for appeal purposes 3 copies of docket entries 1 cert mailed to the U.S. Ct. of Appeals.
Nov 12	—	Letter received and filed from the Ct. of Appeals advising that the case is docketed at No. 85-3620.
Nov 12	—	Certified list in lieu of record received from Ct. of appeals as to 85-3620.

Dec 24	—	Certified copy of order issued 12-20-85 in the Ct. of Appeals and filed; directing that the foregoing appeal is dismissed.
1986		
Sept 2	15	Order rec'd and filed from the Ct. of Appeals, directing that the petition is hereby granted and the Clerk of that Court is directed to issue a writ of mandamus in accordance with the opinion of the court; each party to bear its own costs; writ of mandamus attached and filed.
Sept 26	16	Certified copy of order issued 9-24-86 in the Ct. of Appeals rec'd and filed; directing that the Clerk of that court list the above case for rehearing before the Court in banc at the convenience of the court; further ordered that the opinion and writ of mandamus be and are hereby vacated.
Nov 26	17	Certified copy of order issued 11-24-86 rec'd and filed from the Ct. of Appeals directing that the petition for a writ of mandamus be and is hereby denied; each side to pay its own costs;
Nov 26	—	Receipt for same mailed to the U.S. Ct. of Appeals.

Nov 26	18	Motion of defts for stay pending application to the United States Supreme Court filed with a proposed order.
1986		
Dec 4	19	Response by defts to pltfs reply to motion by defts for stay filed.
1987		
Jan 16	20	Information sheet on post decision matter rc'd from Ct. of Appeals advising writ of certiorari was filed 12/24/86 in Supreme ct at 86-1021

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CARNEGIE-MELLON UNIVERSITY
and JOHN KORDESICH,
Petitioners
vs.
HONORABLE MAURICE B. COHILL, JR.,
United States District Judge,
Nominal Respondent
and
WILLIAM BOYLE and CARRIE BOYLE,
Respondents

DOCKET No. 85-3619

DATE	FILINGS—PROCEEDINGS
1985	
Nov 6	Petition for writ of mandamus, filed.
Nov 6	Appendix in support of petition for writ of mandamus, w/svc., filed. (mgp)
Nov 6	Motion by pets/applts to consolidate appeal in 85-3620 and petition for writ of mandamus in 85-3619, w/svc, filed. (Cv. 85-3619/20) (dt)
Nov 7	Submitted on petition for writ of mandamus. Coram: Weis, Sloviter and Stapleton, C.J. (dt)
Nov 7	Submitted on pets/applts' motion to consolidate. Coram: Weis, Sloviter and Stapleton, C.J. (dt)
Dec 20	Order (*Weis*, Sloviter and Stapleton, C.J.) directing respondents Boyle, et al., to file an answer to the petition for mandamus within 20 days of the date of this order, filed. (dt)
1986	
Jan 9	Answer of respondents to petition for writ of mandamus, recd at the direction of the Court, filed. (dt)
Jan 27	Order (*Weis*, Sloviter and Stapleton, C.J.) referring the petition for writ of mandamus to a merits panel. The Clerk of Court shall fix a briefing schedule, filed. (dt)
Jan 27	Order (Clerk) directing the parties to abide by the following briefing schedule: 1. Brief for petitioners and the appendix shall be filed and served on or before 2/11/86; 2. Brief for respondents shall be filed and served on or before 2/26/86; 3. RB for petitioners, if any, shall be filed and served on or before 3/5/86; and it is further ordered that the Clerk shall list this case for disposition at the earliest convenience of the Court, filed. (dt)
Aug 29	Writ of Mandamus by the Acting Clerk of Court of Appeals filed. (sa) VACATED
Aug 29	Order (Sloviter, Stapleton, Cir. Judges and Longobardi, Dist. Judge) ordering and adjudging and decreed by this Court the prayer of partner is granted. The Clerk of Ct. directed to issue writ of mandamus. Each party to bear its own costs. (sa) VACATED
Aug 29	Certified copy of writ of mandamus and order sent to the Clerk of D.C. (sa)

Sept 24	Order (Aldisert, Ch Judge Seitz Adams *Gibbons,* Weis Higginbotham Sloviter Becker Stapleton and Mansmann, Cir. Judges.) granting pet. for rehg. Further ordering that the Clerk list case for rehg. before the Ct in banc at the convenience of the Ct. & Further ordering that the opinion and writ of mandamus be vacated. filed (sa)
Nov 13	Reargued In Banc. Coram: Aldisert, Ch.J., Seitz, Adams, Gibbons, Weis, Higginbotham, Sloviter, Becker, Stapleton & Mansmann, CJ. (ab)
Nov 24	Order (*Aldisert,* Chief Judge, Seitz, Adams, Gibbons Weis, Higginbotham Sloviter Becker Stapleton and Mansmann, Cir. Judges) Ordering and adjudging that the pet. for writ of mandamus be and is hereby denied. Each side to pay its own csts. (sa)
Nov 24	Certified copy of above order sent to the Clerk of the D.C. (sa)
Dec 1	Receipt of 11/24/86, order received from C. of D.C., filed. (mgp)

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM BOYLE and
CARRIE BOYLE,
Plaintiffs,
v.
CARNEGIE-MELLON
UNIVERSITY
and JOHN KORDESICH,
Defendants.

Civil Action
No. 84-2285

NOTICE

TO: Prothonotary
Court of Common Pleas of Allegheny
County, Pennsylvania
Allan J. Opsitnick
Hickton & Opsitnick
527 Second Avenue
Pittsburgh, Pennsylvania 15219

Please take notice that a Petition for Removal and Cash Bond were filed in the United States District Court for the Western District of Pennsylvania on September 21, 1984. We hereby certify that the Petition for Removal attached hereto is a true and correct copy of the original as filed in Federal Court.

/s/ WALTER P. DEFOREST
Walter P. DeForest
Robert E. Sheeder
Reed Smith Shaw & McClay
847 Two Mellon Bank Center
Pittsburgh, Pennsylvania 15219
Counsel to Defendants

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM BOYLE and
CARRIE BOYLE,
Plaintiffs,
v.
CARNEGIE-MELLON
UNIVERSITY
and JOHN KORDESICH,
Defendants.

Civil Action
No. -

PETITION FOR REMOVAL

TO: The Judges for the United States
District Court for the Western
District of Pennsylvania

Petitioners Carnegie-Mellon University and John Kordesich (hereafter "Petitioners"), hereby petition as follows:

1. On or about September 13, 1984, a Complaint against Petitioners was filed in the Court of Common Pleas of Allegheny County, Pennsylvania. A copy of said Complaint is attached hereto as Exhibit 1.

2. In said Complaint, Plaintiffs William Boyle and Carrie Boyle allege that in September 1983, at the age of 56, William Boyle was discharged from his employment with Petitioner Carnegie-Mellon University.

3. In Count I of the Complaint, Plaintiffs allege, *inter alia,* that William Boyle was wrongfully discharged and denied employment by Carnegie-Mellon University because of his age.

4. At Paragraph 13 of the Complaint, Plaintiffs specifically aver that these alleged discriminatory actions by Petitioner Carnegie-Mellon University were in violation of the laws of the United States of America.

5. At Paragraph 14, Plaintiffs aver that William Boyle was also discriminatorily denied rehire by Carnegie-Mellon University because of his age.

6. Paragraphs 13 and 14 clearly aver a cause of action arising under Federal law, specifically the Federal Age Discrimination in Employment Act, 29 U.S.C. §§621 *et seq.;* and therefore aver a cause of action subject to federal jurisdiction without regard to the amount in controversy or the citizenship of the parties, pursuant to 29 U.S.C. §626(c)(1) of the Federal Age Discrimination in Employment Act and 28 U.S.C. §§1331 and 1343.

7. Count I of the Complaint also purports to raise an action under Pennsylvania statutory law and a common law tort based upon the same alleged operative facts as underlie the averments of Paragraphs 13 and 14.

8. These additional claims in Count I, arising from the same alleged operative facts as Plaintiff's Federal claims, are subject to pendent Federal jurisdiction.

9. Count II of the Complaint avers a common law Assumpsit action against Petitioner Carnegie-Mellon University, which is based on the same alleged operative facts as underlie Plaintiffs' Federal claims, and over which there is clearly pendent Federal jurisdiction.

10. Count III of the Complaint avers a common law tort claim against Petitioner John Kordesich which is

based on the same alleged operative facts as underlie Plaintiffs' Federal claims, and over which there is also pendent Federal jurisdiction.

11. Count IV of the Complaint avers a common law tort claim against both Petitioners Carnegie-Mellon University and John Kordesich by Plaintiff Carrie Boyle, which is based on the same alleged operative facts as underlie Plaintiffs' Federal claims, and over which there is also pendent Federal jurisdiction.

12. Petitioners have filed a cash bond with good and sufficient surety as required by 28 U.S.C §1446(d).

WHEREFORE, for the above reasons, Petitioners request that the above-described action, pending in the Court of Common Pleas of Allegheny County, Pennsylvania be removed therefrom to this Court.

Walter P. DeForest
Robert E. Sheeder

Reed Smith Shaw & McClay
847 Two Mellon Bank Center
Pittsburgh, Pennsylvania 15219

Counsel to Petitioners

Dated: September 21, 1984

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

WILLIAM BOYLE and
CARRIE BOYLE,
Plaintiffs,
vs.
CARNEGIE-MELLON
UNIVERSITY
and JOHN KORDESICH,
Defendants.

DIVISION-CIVIL

No. GD 84-16147
Issue No.

Pleading—
COMPLAINT IN
CIVIL ACTION

Code—001
ASSUMPSIT/
TRESPASS

Filed on behalf of:

Counsel of Record for
this Party:

Allan J. Opsitnick
Pa. I.D. #28126

HICKTON &
OPSITNICK
Firm #707
527 Second Avenue
Pittsburgh, PA 15219
(412) 471-1511

I CERTIFY THIS TO BE A TRUE AND CORRECT COPY OF THE ORIGINAL FILED IN THIS CASE.

/s/ ALLAN J. OPSITNICK
ATTORNEY FOR PLAINTIFF

NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE OR KNOW A LAWYER OR CANNOT AFFORD ONE, THEN YOU SHOULD GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP:

LAWYER REFERRAL SERVICE
ALLEGHENY COUNTY BAR ASSOCIATION
920 CITY-COUNTY BUILDING
PITTSBURGH, PA 15219

TELEPHONE: (412) 261-2088

COMPLAINT IN TRESPASS & ASSUMPSIT

AND NOW, come Plaintiffs William S. Boyle and Carrie Boyle, his wife, by their attorneys, Allan J. Opsitnick, Esq., Hickton & Opsitnick, and bring this cause of action against Defendants as set forth more fully below:

1. Plaintiff William S. Boyle is an adult individual residing at 6523 Leechburg Road, Penn Hills, Allegheny County, Pennsylvania.

2. Plaintiff Carrie Boyle is an adult individual, and the wife of William S. Boyle, residing at 6523 Leechburg Road, Penn Hills, Allegheny County, Pennsylvania.

3. Defendant, Carnegie-Mellon University, is a corporation with its principal place of business located at 5000 Forbes Avenue, Pittsburgh, Allegheny County, Pennsylvania.

4. Defendant, John Kordesich, is an adult individual employed by defendant, Carnegie-Mellon University, with his business address at 5000 Forbes Avenue, Pittsburgh, Allegheny County, Pennsylvania.

5. William S. Boyle (hereinafter referred to as "Boyle") had been an employee of defendant, Carnegie-Mellon University (hereinafter referred to as "University") from June, 1967 through and including September 9, 1983.

6. In September, 1983, Boyle was discharged from his employment by the University. Said discharge was illegal, improper, and otherwise wrongful, and in violation of contractual obligations on the part of the University and tortious as to be both the University and Defendant Kordesich (hereinafter referred to as "Kordesich").

Count I—William S. Boyle vs Carnegie-Mellon University—In Trespass

7. Paragraphs 1 through 6, above, are hereby incorporated by reference.

8. The discharge of Boyle by the University and subsequent failure to rehire Boyle constitutes a tortious and improper discharge under the laws of the Commonwealth of Pennsylvania.

9. More specifically, the discharge of Boyle by the University was wrongful in that:

(a) The discharge was contrary to public policy;

(b) The discharge was contrary to all generally accepted principles of fairness, good faith and equity;

(c) The conduct of the University in discharging Boyle was outrageous and constitutes intentional infliction of emotional distress;

(d) The University has published defamatory statements regarding Boyle;

(e) The University has made certain misrepresentations to and regarding Boyle.

10. Said discharge is in violation of the public policy of this Commonwealth since Boyle was discharged because he refused to accept any form of blame or guilt in a scheme involving improper billings and theft of property by a certain member of the Locksmith Department of the University.

11. Furthermore, Boyle drew attention to, and tried to correct instances of theft of University property.

12. Said discharge of Boyle was without any foundation and a competent, industrious and loyal employee was terminated as a scapegoat after the abovementioned theft scheme was discovered.

13. Said termination was also based upon Boyle's age, 56, and was therefore illegal and improper and in violation of the laws of the United States of America and the Commonwealth of Pennsylvania.

14. Boyle was also the victim of discrimination in rehiring. Norman Gerlach, an air conditioning foreman, was fired at almost the same time as Boyle, but was rehired thereafter. Boyle has requested rehiring on a number of occasions, but has not been rehired. In fact, the University has stated that it shall not rehire Boyle.

15. The conduct of the University and its agents, servants and employees, in discharging a long term, competent, industrious and loyal employee, without any foundation and without economic reason, and more specifically, discharging Boyle after conjuring up improper reasons for the discharge constitutes outrageous conduct which led to the intentional infliction of emotional distress upon Boyle.

16. Said conduct has caused Boyle severe emotional distress, more specifically, anxiety and other nervous disorders; high blood pressure and nervousness; and interference with his heretofore well balanced relationship with his wife and family.

17. Boyle has been defamed by the University in that the false statements regarding Boyle that constituted the basis for his discharge have been communicated to other members of the University, former fellow employees of Boyle and prospective employers.

18. These defamatory statements impugn Boyle's character generally, and his ability to work as an electrician and deal with others on the job, more specifically.

19. The publication of defamatory comments has caused Boyle damage through humiliation and embarrassment in the community and the inability to obtain employment since his wrongful discharge.

20. The University has engaged in misrepresentation to both Boyle and to others inside and outside of the University community in that the grounds allegedly the basis of Boyle's discharge were communicated to these other people and said persons have relied on these misrepresentations.

21. The reliance upon the abovementioned misrepresentations by said third persons have damaged Boyle.

22. The abovementioned tortious conduct by the University is the direct and proximate cause of serious injury and damage to Boyle.

23. Boyle has suffered injury and damage as follows:

(a) Severe emotional distress;

(b) Anxiety;

(c) Nervous disorders;

(d) High blood pressure;

(e) Interference with a heretofore well balanced relationship with wife and family;

(f) Embarrassment and humiliation;

(g) Ruination of reputation;

(h) Loss of income from employment, both wages and benefits;

(i) Expenditures of monies on medical services;

(j) Loss of expected income in promotions, raises and improvement in benefits;

(k) Pain, suffering and inconvenience.

24. Boyle also demands reinstatement to his former position as well as punitive damages and counsel fees.

WHEREFORE Boyle respectfully requests that judgment be entered in his favor and against Defendant University in an amount exceeding twenty thousand dollars ($20,000.00).

A JURY TRIAL IS DEMANDED.

Count II—William Boyle vs Carnegie-Mellon University—In Assumpsit

25. Paragraphs 1 through 24 above are hereby incorporated by reference.

26. Boyle was discharged by the University in violation of both express and implied contracts of employment which prohibited said termination.

27. An express contract between Boyle and the University was formed through certain provisions of the "Staff Handbook" distributed by the University to all employees. More specifically, the following contractual terms were breached by the University:

(a) The failure to terminate for one of the specified grounds that are the sole reason for a "cause" termination. These grounds are
    (1) chronic absenteeism;

(2) theft;

(3) unauthorized use or removal of property;

(4) neglect of duty;

(5) unlawful use of dangerous drugs or alcohol on the job;

(6) intoxication on the job;

(7) immoral conduct;

(8) absence without notice;

(9) insubordination;

(10) destruction of CMU property;

(b) Failure to adhere to the grievance procedure as outlined in the "Staff Handbook";

(c) Failure to adhere to the progressive discipline provisions as outlined by the "Staff Handbook".

The applicable provisions of the "Staff Handbook" are attached hereto, labelled Exhibit 1 and are incorporated by reference.

28. An implied contract existed between Boyle and the University which was breached by the University. More specifically, this implied contract arose out of Boyle's long service with the University and was reaffirmed when Boyle took a position as acting Maintenance Manager until a replacement could be found, and then returned to his prior job as Electrical Foreman.

29. Boyle relied on the implied contractual relationship that he would continue his employment as long as he would perform his work properly. Boyle did so through and including the date he was fired.

30. Because of the abovementioned contractual breaches by the University, Boyle has sustained the following items of damage:

(a) Separation from employment;

(b) Loss of income from employment, both wages and benefits;

(c) Loss of expected income in promotions, raises and improvements in benefits;

(d) The expenditure of funds to renew Boyle's electrician's license, necessary for his employment.

WHEREFORE Boyle respectfully requests that judgment be entered in his favor and against Defendant University in an amount exceeding twenty thousand dollars ($20,000.00).

A JURY TRIAL IS DEMANDED.

Count III—William S. Boyle vs John Kordesich—In Trespass

31. Paragraphs 1 through 30 above are hereby incorporated by reference.

32. Defendant Kordesich (hereinafter referred to as "Kordesich") was, by nature of his position as Boyle's immediate supervisor, in a position to affect Boyle's employment relationship with the University.

33. Kordesich did fabricate grounds to implement the discharge of Boyle and in doing so, acted in a negligent, willful, wanton and reckless fashion. More specifically, Kordesich acted so as to commit the following torts:

(a) Tortious interference with a contractual and/or business relationship;

(b) Misrepresentations;

(c) Intentional infliction of emotional distress;

(d) Defamation.

34. Kordesich acted in a fashion so as to ruin Boyle's longstanding contractual and/or business and employment relationship with the University and to cause Boyle to be discharged from his employment with the University. This was done by Kordesich's falsifying grounds for Boyle to be discharged and by harassing Boyle as he worked.

35. Kordesich has engaged in misrepresentation to both Boyle and others inside and outside of the University community, in that the grounds allegedly the basis for Boyle's discharge were communicated to other people and said persons have relied on these misrepresentations.

36. Kordesich's conduct in developing a negative attitude toward Boyle and by fabricating grounds which led to the wrongful discharge of Boyle by the University, which conduct was, at least in part, to cover up Kordesich's failure to detect certain thefts of services and funds by a member of the University's Locksmith Department, constitutes outrageous conduct which led to intentional infliction of emotional distress upon Boyle.

37. Said conduct has caused Boyle severe emotional distress, more specifically, anxiety and other nervous disorders; high blood pressure and nervousness; and interference with his heretofore well balanced relationship with his wife and family.

38. Boyle has been defamed by Kordesich in that false statements regarding Boyle that constituted the basis for his discharge have been communicated to other members of the University, former fellow employees of Boyle and prospective employers.

39. These defamatory statements impugn Boyle's character generally, and his ability to work as an electrician and deal with others on the job, more specifically.

40. The publication of defamatory comments has caused Boyle damage through humiliation and embarrassment in the community and the inability to obtain employment since his wrongful discharge.

41. The abovementioned tortious conduct by Kordesich is the direct and proximate cause of serious injury and damage to Boyle.

42. Boyle has suffered injury and damage as follows:

(a) Severe emotional distress;

(b) Anxiety;

(c) Nervous disorders;

(d) High blood pressure;

(e) Interference with heretofore well balanced relationship with wife and family;

(f) Embarrassment and humiliation;

(g) Ruination of reputation;

(h) Loss of income from employment, both wages and benefits;

(i) Expenditures of monies on medical services;

(j) Loss of expected income in promotions, raises and improvement in benefits;

(k) Pain, suffering and inconvenience.

43. Boyle also demands punitive damages and counsel fees.

WHEREFORE, Boyle asks for judgment against John Kordesich in an amount in excess of twenty thousand dollars ($20,000.00).

A JURY TRIAL IS DEMANDED.

Count IV—Carrie Boyle vs Carnegie-Mellon University and John Kordesich In Trespass

44. Paragraphs 1 through 43 above are hereby incorporated by reference.

45. Plaintiff, Carrie Boyle, has continuously resided with Plaintiff, William S. Boyle, during his period of employment at the University, and ever since his termination in September, 1983.

46. Plaintiff, Carrie Boyle, has witnessed the effect of the wrongful, vicious actions of the University and Kordesich upon the physical and emotional state of her husband and, in turn, has suffered the following items of injury and damage:

(a) Loss of consortium;

(b) Loss of companionship;

(c) Loss of life's pleasures;

(d) Loss of household services furnished by Plaintiff, William S. Boyle;

(e) Loss of income expectancy through her husband's employment.

47. The actions of the University and Kordesich are the direct and proximate cause to the injury and damage to

Plaintiff, Carrie Boyle, and the University and Kordesich are jointly and severally liable therefore.

48. Plaintiff, Carrie Boyle, also demands punitive damages and counsel fees against both Defendants.

WHEREFORE, Plaintiff, Carrie Boyle, requests judgment in her favor against Defendants Carnegie-Mellon University and John Kordesich in an amount in excess of twenty thousand dollars ($20,000.00).

A JURY TRIAL IS DEMANDED.

Respectfully submitted,

Allan J. Opsitnick, Esq.
HICKTON &
OPSITNICK
527 Second Avenue
Pittsburgh, PA 15219

Attorneys for the Plaintiffs

Termination of Employment

All employees are expected to give at least two weeks' notice of resignation. Exempt personnel should give at least one month's notice.

Employees submitting resignations will be paid through the last day worked and will receive their checks the first payday following the resignation. If advance notice of resignation has been received by CMU, the employee with at least one year of continuous service will be eligible for payment for all vacation time earned but not taken at the time of separation. Other benefits may be available. Therefore, all terminating employees should contact Personnel Advisory Services to arrange for an exit interview.

Immediate dismissal will normally be given for the following behavior: chronic absenteeism, theft, unauthorized use or removal of property, neglect of duty, unlawful use of dangerous drugs (dangerous drugs defined to include amphetamines and barbiturates) or alcohol on the job, intoxication on the job, immoral conduct, absence without notice in excess of three consecutive days, insubordination, destruction of CMU property.

Discharge due to unfavorable conduct does not provide for pay in lieu of notice. In addition, when employees are terminated during their probationary period for reasons other than those cited above, there is no provision for pay in lieu of notice.

EXHIBIT 1

GRIEVANCE PROCEDURE

Purpose and Scope

At Carnegie-Mellon University every effort is being extended to continue to make this University a pleasant and rewarding place to work. In any organization, however, problems and differences of opinion do arise. This policy establishes the rules and procedures to solve these on-the-job problems of employees.

Policy

Most on-the-job problems can be settled if you are willing to take your problem to your immediate supervisor where the problem can be discussed. There may be times, however, when you feel that your problem has not been solved by your immediate supervisor, or that you have been treated unfairly. The following procedure ensures all employees due consideration of any problem concerning wages, hours of work, benefits, status, other terms and conditions of employment, and affirmative action. (Note: In certain departments the organizational structure is such that a greater or fewer number of steps may be appropriate. The Personnel Director will interpret the procedure in this regard.)

You will suffer a loss of earnings if you lose time from your regular day's work as a result of the presentation and discussion of an on-the-job problem.

Procedure

a. *First Step*

The employee should talk over the problem with his or her immediate supervisor (the person the employee reports to). It is the responsibility of each member of supervision to consider and attempt to settle problems as quickly as possible.

b. *Second Step*

If the employee has spoken to the immediate supervisor and feels that the problem has not been considered fairly, or if no action is taken, he or she should tell the immediate supervisor that the answer is not satisfactory and that he or she would like to discuss the problem with the department head. The supervisor should set up a meeting with the employee's department head as soon as possible after hearing of the employee's dissatisfaction.

c. *Third Step*

If the employee is not satisfied with the solution after completing the first and second steps, he or she should present the problem in writing (with a copy to the department head) to the Dean or equivalent person responsible for the administration of the department to which he or she is assigned. The Dean will promptly set a date for a discussion of the problem with the employee. Within two days after the discussion, excluding Saturdays, Sundays and holidays, the Dean will give the decision to the employee in writing. In unusual cases additional time may be necessary to obtain essential data or information.

d. *Fourth Step*

If the first three steps fail to solve the problem, the employee should then explain the problem in writing (with a copy to the Dean) to the appropriate person one level below the President (Provost, Vice President, Chief Officer, Treasurer, etc.). A meeting will be promptly scheduled with the employee; and the solution to the problem will be given to the employee in writing within two days, excluding Saturdays, Sundays and holidays, unless additional time is necessary to obtain data or essential information.

e. *Fifth Step*

If the Fourth Step fails to solve the problem, the employee should contact Personnel Advisory Services to assist in preparing a written presentation of the problem to the President.

The President will promptly set a date for a discussion of the problem with the employee. Within two days after the discussion, excluding Saturdays, Sundays and holidays, the President will give the decision to the employee in writing. In unusual cases additional time may be necessary to obtain essential data or information.

Function of Personnel Advisory Services

Personnel Advisory Services is available to help both supervisors and employees come to practical and workable solutions to all problems. The Personnel Director may be consulted at any time by a supervisor or an employee with a personal problem he or she wishes to discuss in confidence. The Personnel Director will answer questions at any time in the procedure and will assist any employee in the preparation of a written presentation.

Conclusion

This procedure is Carnegie-Mellon University's way of handling on-the-job problems and assuring every employee of fair treatment at all times. It means that every employee may personally take his problems right to the top for a hearing without fear of being penalized for doing so, and every employee is assured that in no way will the use of this procedure jeopardize his or her position. The free and prompt use of this procedure will benefit the University and all its employees.

Certain colleges/divisions have made minor revisions in the procedure to satisfy needs within their departments and to facilitate its use by an employee who feels that it is necessary.

CODE OF CONDUCT

Discipline

Rules and regulations are necessary in every organization. The best working conditions prevail where employees conduct themselves with respect and consideration for their fellow employees and their employer. Rules and regulations are needed to provide safety, happiness and productivity.

Carnegie-Mellon University has developed a discipline plan which indicates those offenses that normally warrant disciplinary action. Action may include reprimand, suspension and/or dismissal:

a. Reprimand: Either verbal or written reprimand may be made by supervisors for sub-standard performance, poor attendance and other types of offenses. Reprimands should be preceded by counseling; written reprimands are a part of the employee's permanent record.

b. Imposed probation: Employees who fail to respond to counseling concerning attendance or performance problems may be placed on imposed probation for from one to three months on authority of their immediate supervisor with the approval of the appropriate department head. This action must be reported to Personnel Advisory Services in writing where it will be filed in the employee's record. Employees who fail to respond to guidance during their period of imposed probation will normally be terminated. Merit wage increases will not be given to an employee during this period.

c. Downgrading: It may be necessary to downgrade an employee into a lower classification with a resultant decrease in salary. All downgrading action must be documented in writing and filed in the employee's record and approved by the appropriate department head.

d. Suspension: Employees who become involved in serious attendance, performance or other problems may be suspended from duty by their supervisor and/or department head for from one to ten working days without pay. Suspension is normally imposed to permit an investigation prior to taking final action, when the offense which caused suspension would normally require dismissal. All suspension actions must be given to employees in writing and must be reported to Personnel Advisory Services in writing by the department head or supervisor. This information will be entered on the employee's permanent record. No employee benefits will be paid or accrued to an employee while on suspension.

e. Dismissal: A careful review of every case recommended for dismissal for cause will be made by the appropriate department head before any dismissal notice is given. Such action will be taken as a last resort after reasonable attempts to improve the employee have been made.

These subjects have been discussed in previous sections of the Handbook including the section on Termination of Employment. All disciplinary actions are subject to appeal by the grievance procedure.

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA } ss:
COUNTY OF ALLEGHENY }

Before me, the undersigned authority, personally appeared Carrie Boyle who being duly sworn according to law depose(s) and say(s) that the facts set forth in the foregoing Complaint are true and correct to the best of his/her knowledge, information and belief.

....../s/ CARRIE BOYLE......

SWORN TO AND SUBSCRIBED
before me this 5th
day of September, 1984.

MARY M. BEDNER, NOTARY PUBLIC
PITTSBURGH, ALLEGHENY COUNTY
MY COMMISSION EXPIRES APRIL 21, 1988
Member: Pennsylvania Association of Notaries

./s/ MARY M. BEDNER.
Notary Public

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA } ss:
COUNTY OF ALLEGHENY

Before me, the undersigned authority, personally appeared William S. Boyle who being duly sworn according to law depose(s) and say(s) that the facts set forth in the foregoing Complaint are true and correct to the best of his/her knowledge, information and belief.

/s/ WILLIAM S. BOYLE

SWORN TO AND SUBSCRIBED
before me this 5th
day of September, 1984.

MARY M. BEDNER, NOTARY PUBLIC
PITTSBURGH, ALLEGHENY COUNTY
MY COMMISSION EXPIRES APRIL 21, 1988
Member: Pennsylvania Association of Notaries

/s/ MARY M. BEDNER
Notary Public

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM BOYLE and
CARRIE BOYLE,
Plaintiffs,
vs.
CARNEGIE-MELLON
UNIVERSITY
and JOHN KORDESICH,
Defendants.

CIVIL ACTION
No. -

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA } ss:
COUNTY OF ALLEGHENY

BEFORE ME, the undersigned authority, in and for the said State and County, personally appeared Linda Binstock, who being duly sworn according to law, deposes and states that as Manager, Federal Compliance and Safety for Petitioner, Carnegie-Mellon University, she has authority to make this Affidavit and that the averments of fact set forth in the foregoing Petition for Removal are true and correct to the best of her knowledge, information and belief.

/s/ LINDA G. BINSTOCK

Sworn to and subscribed
before me this 21st
day of September, 1984.

COLLEEN S. SMITH, NOTARY PUBLIC
PITTSBURGH, ALLEGHENY COUNTY
MY COMMISSION EXPIRES SEPT. 15, 1988
Member: Pennsylvania Association of Notaries

/s/ COLLEEN S. SMITH
Notary Public

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing Petition for Removal was served by United States mail, first class, postage prepaid, to:

Allan J. Opsitnick, Esquire
527 Second Avenue
Pittsburgh, Pennsylvania 15219

..../s/ Robert E. Sheeder....

Dated: September 21, 1984

In The United States District Court
For The Western District Of Pennsylvania

WILLIAM BOYLE and
CARRIE BOYLE,
Plaintiffs,
vs.
CARNEGIE-MELLON
UNIVERSITY
and JOHN KORDESICH,
Defendants.

Civil Action
No. 84-2285

NOTICE OF PRETRIAL PROCEDURE

Notice is hereby given that Rule 5II is invoked and All counsel will be governed according to the pretrial procedure set forth therein as it applies to the parties of this case. No variance from the procedure set forth in the rule will be permitted without a Petition or Motion specially directed to and approved by the Judge assigned to this case.

..../s/ Richard Witas.....
Richard Witas, *Courtroom Deputy Clerk to the Honorable Maurice B. Cohill, Jr.*

Dated: November 14, 1984

DISCOVERY ENDS: March 15, 1985
Pltfs Pretrial Due: April 5, 1985
Defts Pretrial Due: April 26, 1985
Stip of Counsel: May 15, 1985

Copies to:
(COUNSEL OF RECORD)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM BOYLE and CARRIE BOYLE, *Plaintiffs,* vs. CARNEGIE-MELLON UNIVERSITY and JOHN KORDESICH, *Defendants.*	**Civil Action** **No. 84-2285**

ORDER OF COURT

AND NOW, to-wit, this 8th day of March, 1985, upon consideration of the aforegoing Motion for Enlargement of Discovery Period, it is hereby ORDERED and DECREED that the parties are permitted to conduct discovery in this case for an additional 60 days from March 15, 1985. Discovery shall end on May 14, 1985.

The dates of the pre-trial submissions of the parties and the stipulations of the parties shall be adjusted accordingly.

By the Court,

/s/ MAURICE B. COHILL, JR.

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM S. BOYLE and CARRIE BOYLE, his wife, *Plaintiffs,* vs. CARNEGIE-MELLON UNIVERSITY, and JOHN KORDESICH, *Defendants.*	**Civil Action** **No. 84-2285**

MOTION TO REMAND FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA TO THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY*

AND NOW, come the Plaintiffs, William S. Boyle and Carrie Boyle, by and through their attorneys, Allan J. Opsitnick, Esquire, and Hickton and Opsitnick and, upon the basis of the facts herein and supported by the Memorandum, attached hereto and made a part hereof, respectfully requests this Honorable Court to remand this action to the Court of Common Pleas of Allegheny County, Pennsylvania from which court it was removed to this Honorable Court, for the following reasons:

1. This Motion for Remand is made pursuant to the provisions of 28 U.S.C. §1447 (c), which provides for remand of any case improvidently removed from a state court, after which said remand the state may then proceed upon the case.

---

*Notice of Motion and Certificate of Service omitted in printing.

2. This action stems from the allegedly improper discharge of plaintiff, William Boyle by defendant, Carnegie-Mellon University and John Kordesich on or about September 9, 1983.

3. The complaint as has been filed by plaintiffs contains allegations of the following causes of actions:

a. Wrongful discharge, in tort;

b. Wrongful discharge, as breach of contract;

c. Intentional inflection of emotional distress;

d. Defamation;

e. Misrepresentation;

f. Violation of federal age discrimination laws;

g. Violation of Pennsylvania age discrimination laws;

h. Tortious interference with a contractual and/or business relationship.

4. All causes of actions have been denied by defendants.

5. Pursuant to preparation with plaintiffs for their depositions, taken on February 22, 1985, and a review of certain documents possessed by defendants at said depositions, plaintiffs believe that certain causes of actions against defendants are without merit.

6. More specifically, plaintiffs feel that it is extremely unlikely that, at trial, they would prevail on the following causes of action:

a. Violation of federal age discrimination laws;

b. Violation of state age discrimination laws;

c. Defamation.

7. In addition, plaintiffs feel that certain elements of damage alleged cannot be substantiated. More specifically, the allegations of a loss of consortium and an interference with family relationship in so far as it relates to interference with sexual relations between the plaintiffs.

8. Plaintiffs intend to request this Honorable Court for leave to amend their complaint to delete the above causes of action and above damage allegations. Contemporaneous with the filing and presentation of this Motion and its supporting Memorandum, plaintiffs have filed a Motion for Leave to File an Amended Complaint.

9. Defendants had filed a Petition for Removal in this case, the sole grounds for removal being that a federal question was involved, more specifically an allegation under the Federal Age Discrimination Employment Act, 29 U.S.C. §621.

10. With the deletion of the federal question as well as the other causes of action as mentioned above, it is clear that the only remaining causes of action are commonlaw torts and a commonlaw assumpsit action under the laws of the Commonwealth of Pennsylvania.

11. Should the amended complaint be permitted to be filed, no federal question would be remaining and a remand of this case to the Common Pleas Court of Allegheny County would be required under the provisions of applicable laws and in the interest of state sovereignty, comity and judicial respect for the jurisdiction for other courts.

12. A remand of this action to state court is required and would not prejudice defendants in this action. More

specifically, defendants have taken three depositions and have requested and received certain documents and have done nothing that they would not do or be required to do if this action were pursued in state court.

13. There has been a 60 day extention by this Honorable Court for the completion of discovery, that is until May 14, 1985. There has been no pre-trial conference, pretrial statement of the parties, or stipulation of the parties conducted or prepared in this case.

WHEREFORE, in consideration of the aforegoing facts, plaintiffs, William Boyle and Carrie Boyle, respectfully request this Honorable Court to enter an Order Remanding this Action from the United States District Court for the Western District of Pennsylvania to the Court of Common Pleas of Allegheny County, Pennsylvania.

Respectfully submitted,
/s/ ALLAN J. OPSITNICK, ESQUIRE
Attorney for Plaintiffs
HICKTON & OPSITNICK
527 Second Avenue
Pittsburgh, PA 15219
(412) 471-1511

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM S. BOYLE, and
CARRIE BOYLE, his wife,
Plaintiffs,
vs.
CARNEGIE-MELLON
UNIVERSITY,
and JOHN KORDESICH,
Defendants.

Civil Action
No. 84-2285

ORDER OF COURT REMANDING CASE TO STATE COURT

The Motion of plaintiffs, William S. Boyle and Carrie Boyle, to remand the abovecaptioned matter to the Common Pleas Court of Allegheny County, Pennsylvania having been duly and carefully considered, it is

ORDERED AND DECREED that the motion be, and is, granted, and that this cause be, as remanded to the Common Pleas Court of Allegheny County, Pennsylvania, for further proceedings.

DATED: ...., 1985.

....
Maurice B. Cohill, Jr.
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM S. BOYLE, and
CARRIE BOYLE, his wife,
Plaintiffs,
vs.
CARNEGIE-MELLON
UNIVERSITY,
and JOHN KORDESICH,
Defendants.

Civil Action
No. 84-2285

MOTION FOR LEAVE TO AMEND COMPLAINT*

AND NOW, come plaintiffs, William Boyle and Carrie Boyle, by their attorneys, Allan J. Opsitnick, Esquire, and Hickton and Opsitnick and, respectfully requests this Honorable Court to permit Leave to Amend the Complaint in the within captioned case, and in support thereof states the following facts:

1. This action is an action for wrongful discharge, age discrimination, and certain torts, including defamation, by plaintiffs against defendants.

2. Plaintiffs' complaint has been served on defendants and defendants have responded.

3. Because of the federal question involved, this matter was removed by defendants to this Honorable Court from the Court of Common Pleas of Allegheny County, Pennsylvania.

4. Plaintiffs, pursuant to preparation for depositions and other discovery in this case, and pursuant to a review of certain documents presented to them at the deposition of plaintiffs, have consulted with their counsel and feel that certain causes of actions alleged in their complaint and certain items of damage alleged in their complaint are not tetable and feel that it would be highly unlikely that they would succeed, at trial.

5. More Specifically plaintiffs desire to amend their complaint and to delete the following causes of action:

a. Defamation by both defendants;

b. Violation of federal age discrimination laws;

c. Violation of Commonwealth of Pennsylvania age discrimination laws.

6. Plaintiffs desire to amend from their allegation of damages a claim for damages because of interference with a well balanced relationship with wife in so far as it effects the sexual relations between the plaintiffs. In addition, plaintiffs desire to delete that element of damage by plaintiff, Carrie Boyle, for loss of consortium.

7. By permitting plaintiffs to amend their complaint, the matters in controversy would be narrowed and defendants would not be at all prejudiced.

8. Federal Rule of Civil Procedure 15 (a) dictates that leave to amend pleadings shall be freely given when justice so requires. Leave should be given in this case to avoid unnecessary litigation and preparation by both sides in this matter.

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*Notice of Motion and Certificate of Service omitted in printing.

WHEREFORE, plaintiffs respectfully requests this Honorable Court to grant leave to plaintiffs to amend their complaint as abovementioned. The amended complaint would be required to be filed in 20 days of said order.

Respectfully submitted,
/s/ ALLAN J. OPSITNICK, ESQUIRE
Allan J. Opsitnick, Esquire
HICKTON AND OPSITNICK
527 Second Avenue
Pittsburgh, PA 15219
(412) 471-1511

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM S. BOYLE, and
CARRIE BOYLE,
Plaintiffs,
vs.
CARNEGIE-MELLON
UNIVERSITY
and, JOHN KORDESICH,
Defendants.

**Civil Action
No. 84-2285**

ORDER OF COURT

The Motion of plaintiffs for Leave to Amend their Complaint so as to delete certain causes of action and certain elements of damage, having been duly and carefully considered, it is

ORDERED AND DECREED that the motion be, and is, granted, and that leave be granted for plaintiffs to file an amended complaint within 20 days of the date of this order.

It is further ordered by this Court that plaintiffs' amended complaint shall delete allegations of violation of federal age discrimination laws, Commonwealth of Pennsylvania age discrimination laws, and defamation. In addition, plaintiffs' amended complaint shall delete allegations of damage of interference with well balanced family life with wife in so far as it relates to sexual relationship and wife/plaintiff's loss of consortium.

DATED: ...., 1985.

....
Maurice B. Cohill, Jr.
United States District Court

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM BOYLE and
CARRIE BOYLE,
Plaintiffs,
vs.
CARNEGIE-MELLON
UNIVERSITY
and JOHN KORDESICH,
Defendants.

Civil Action
No. 84-2285

ORDER OF COURT

AND NOW, to-wit, this 8th day of May 1985, upon consideration of the aforegoing Motion for Enlargement of Time, it is hereby ORDERED and DECREED that the parties shall complete Discovery by forty-five (45) days from the date of disposition of Plaintiffs' Motions for Remand and Motion for Leave to Amend Complaint. Plaintiffs' Pretrial shall be filed by twenty-one (21) days from date discovery shall end. Defendants Pretrial shall be filed by twenty-one (21) days from the date Plaintiffs' Pretrial is due, and Stipulation of Counsel shall be filed twenty-one (21) days from the date Defendants' Pretrial is due.

By the Court,

../s/. MAURICE B. COHILL, JR...

PETITIONER'S

BRIEF

⑤

Supreme Court, U.S.
FILED
APR 8 1987
JOSEPH F. SPANIOL, JR.,
CLERK

No. 86-1021

In the
Supreme Court of the United States

October Term, 1986

CARNEGIE-MELLON UNIVERSITY
and JOHN KORDESICH,
Petitioners,
v.
HONORABLE MAURICE B. COHILL, JR.,
United States District Judge,
Nominal Respondent,
and
WILLIAM BOYLE and CARRIE BOYLE,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS

*WALTER P. DEFOREST III
MARK A. FONTANA
REED SMITH SHAW & McCLAY
Mellon Square
435 Sixth Avenue
Pittsburgh, PA 15219
(412) 288-3383

**Counsel of Record*
for Petitioners

Counsel for Petitioners
Carnegie-Mellon University
and John Kordesich

QUESTION PRESENTED

Whether a district court has authority to remand a properly removed case to state court for a reason not set forth in 28 U.S.C. § 1447(c)—*i.e.*, elimination, by amendment of the complaint, of the federal claim that had formed the basis for removal.

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No. 86-1021

In the
Supreme Court of the United States

October Term, 1986

CARNEGIE-MELLON UNIVERSITY
and JOHN KORDESICH,
Petitioners,
v.
HONORABLE MAURICE B. COHILL, JR.,
United States District Judge,
Nominal Respondent,
and
WILLIAM BOYLE and CARRIE BOYLE,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The November 24, 1986 Order of the Third Circuit, sitting in banc, which denied the petition for the writ of mandamus because the Third Circuit was equally divided, is not officially reported and appears as Appendix A to the Petition for Writ of Certiorari.[1] The August 29, 1986

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[1] Carnegie-Mellon University has no parent company, affiliates or subsidiaries, other than wholly-owned subsidiaries.

Opinion of a panel of the Third Circuit, which had granted the petition for the writ of mandamus, is not officially reported but is unofficially reported at 41 FEP 1046 and appears as Appendix B to the Petition for Writ of Certiorari. The accompanying August 29, 1986 Order granting the petition for writ of mandamus and the August 29, 1986 writ of mandamus, itself, are not officially reported and appear, respectively, as Appendices C and D to the Petition for Writ of Certiorari. The September 24, 1986 Order of the Third Circuit, granting Respondents' petition for rehearing in banc and vacating the panel opinion and the writ of mandamus, is not officially reported but is unofficially reported at 41 FEP 1888 and appears as Appendix E to the Petition for Writ of Certiorari. The October 10, 1985 Opinion and Order of the district court is not officially reported and appears as Appendix F to the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

The Order of the Third Circuit, sitting in banc, upon rehearing, was entered on November 24, 1986. The Petition for Writ of Certiorari was timely filed on December 23, 1986, and granted on February 23, 1987. *See* 28 U.S.C. § 2101(c) (1982 & Supp. 1985). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTES INVOLVED

The statutes involved are the Act of June 25, 1948, ch. 646, 62 Stat. 937, 939, codified as amended at 28 U.S.C. § 1441 and 28 U.S.C. § 1447 (1982).

28 U.S.C. § 1441 provides:

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.[2]

28 U.S.C. § 1447 provides:

§ 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of ~~the or~~der of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

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[2] Subsection e was added to Section 1441 by Pub.L. 99-336, § 3(a), 100 Stat. 637 (June 19, 1986).

STATEMENT OF THE CASE

William Boyle and Carrie Boyle, the plaintiffs below (collectively, the "Boyles"), commenced this action by filing a four count complaint against Carnegie-Mellon University ("C-MU") and John Kordesich in the Court of Common Pleas of Allegheny County, Pennsylvania, on September 7, 1984 (J.A. 15-36). C-MU was William Boyle's former employer and Kordesich his former supervisor (J.A. 17, 23).

The complaint alleged various causes of action including violation of federal and state age discrimination laws, wrongful discharge in tort, wrongful discharge as breach of contract, intentional infliction of emotional distress, defamation, misrepresentation, and tortious interference with a contractual and/or business relationship (J.A. 17-27). All of the claims set forth in the complaint arose out of William Boyle's termination from employment with C-MU. *Id.*

On September 21, 1984, C-MU and Kordesich removed the case to the United States District Court for the Western District of Pennsylvania (J.A. 1, 11-14). The bases for removal were the claims in paragraphs 13 and 14 of the complaint which alleged that William Boyle's termination by C-MU was based upon his age, 56, and "was therefore illegal and improper in violation of the laws of the United States of America and The Commonwealth of Pennsylvania" and that Boyle was also the victim of discrimination in not being rehired (J.A. 12-14). Such claims thereby averred a cause of action subject to federal jurisdiction pursuant to Section 7 of the federal Age Discrimination In Employment Act, Pub. L. 90-202, § 7, 81 Stat. 604, codified as amended at 29 U.S.C. § 626(c)(1) (1982), and the Act of June 25, 1948, ch. 646, 62 Stat. 930, codified as amended at 28 U.S.C. § 1331 (1982). The removal of the case was uncontested.

Following its removal, this case was actively litigated. An answer was filed (J.A. 1). C-MU and Kordesich took various depositions (J.A. 1, 42-44). Document production was also conducted. *Id.*

In the course of the pretrial proceedings, the Boyles had sought and obtained several extensions of the discovery period and the dates for filing pretrial narratives. The district court had originally set March 15, 1985, as the date of close of discovery, with April 5 and 26, 1985, as the dates for filing of the parties' respective pretrial narrative statements (J.A. 39). On March 8, 1985, pursuant to the Boyles' motion, the district court granted an extension of the discovery period until May 14, 1985, with a corresponding extension in the dates of filing of pretrial narratives (J.A. 40).[3]

On April 15, 1985, the Boyles filed a motion for leave to amend the complaint and a motion to remand with the district court (J.A. 2, 41-49). The Boyles sought leave to amend their complaint so that they could delete, *inter alia*, the federal age discrimination cause of action (J.A. 47). In their motion to remand, the Boyles argued that the case was improvidently removed within the meaning of 28 U.S.C. § 1447(c) or, alternatively, that if they were permitted to amend the complaint and delete the federal age discrimination claim, the district court should exercise its discretion and remand the case (J.A. 41, 43-44).

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[3] These dates were again extended by the district court pursuant to a second motion for enlargement of time by the Boyles, while their motion to remand and motion to amend the complaint were pending (J.A. 51).

On October 10, 1985, despite C-MU's and Kordesich's opposition to both motions, the district court issued its Opinion and Order granting the Boyles' motion to amend the complaint, as well as their motion to remand the case to state court (Pet. App. F, 29a, 35a). Although the district court held that the case had not been removed improvidently and without jurisdiction, it nonetheless remanded the case for discretionary reasons not specified in the controlling statute (Pet. App. F, 31a-34a). The district court noted that, by granting the Boyles' amendment, the case was reduced to one involving only state law claims (Pet. App. F, 32a). The district court held that even though the state and federal claims had arisen out of "the same nucleus of operative facts," it would decline to exercise its jurisdiction over the state claims and would remand the case back to the state court (Pet. App. F, 31a-32a).

The district court acknowledged that the "strong implication" of this Court's decision in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), was that district courts are limited by the reasons provided in the governing statutes in remanding removed cases (Pet. App. F, 33a). Nevertheless, the district court noted that there was a split among the various courts of appeals on this issue and elected to follow those courts of appeals which had permitted the remand of cases for discretionary reasons (Pet. App. F, 33a-34a). The district court declined to certify the case for appeal, since it noted that the matter was reviewable under *Thermtron* by means of a petition for writ of mandamus. *Id.*, at 34a.

On November 6, 1985, C-MU and Kordesich filed a petition for writ of mandamus with the United States Court of Appeals for the Third Circuit (J.A. 8). The petition for writ of mandamus was eventually referred to a panel of the Third Circuit for disposition on the merits (Pet. App. H, 38a). The merits panel, by Opinion and Order dated August 29, 1986, granted the petition for writ of mandamus and directed the district court to vacate its remand order (Pet. App. B, 17a; C, 24a; D, 25a). The majority opinion of the merits panel held that there were two statutory provisions authorizing remand after removal, neither of which permitted remand here (Pet. App. B, 10a-11a). The panel majority held that 28 U.S.C. § 1441(c) did not provide a basis for remand because the state law claims were not "separate and independent" claims which could be remanded under 28 U.S.C. § 1441(c). *Id.*, at 11a. The panel majority concurred with the district court's finding that the federal and state claims all arose out of a common nucleus of operative fact, *i.e.*, the circumstances of William Boyle's termination. *Id.*, at 11a-12a. The panel majority also held that the provisions of 28 U.S.C. § 1447(c) did not authorize remand because the case had not been removed improvidently and without jurisdiction. *Id.*, at 12a-13a. The panel majority, after noting the split among the circuit courts, held that this Court's decision in *Thermtron* was controlling and that remands may not be ordered on grounds not authorized by the statues governing removed cases. *Id.*, at 13a-15a. The panel majority also recognized that this Court in *Thermtron* applied the fundamental constitutional principle that the jurisdiction of the inferior federal courts is dependent upon specific statutory authorization. *Id.*, at 16a.

The merits panel dissent concurred with the majority that none of the bases for remand specified in 28 U.S.C. § 1441(c) or § 1447(c) were applicable. However, the merits panel dissent held that, because the state claims could be dismissed without prejudice under this Court's decision in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), a district court should be permitted to remand them to state court, rather than dismissing them (Pet. App. B., 18a). The dissent stated that it believed that Congress would have preferred this result if they had addressed this issue, and that the Supreme Court also would have done the same thing that the district court had done. *Id.*, at 19a-20a.

By Order dated September 24, 1986, the court of appeals granted the Boyles' petition for rehearing in banc and, accordingly, vacated the panel opinion of August 29, 1986, and the writ of mandamus (Pet. App. E, 27a-28a). Argument on rehearing was held on November 13, 1986. By Order dated November 24, 1986, without opinion, the court of appeals, being equally divided, denied the petition for writ of mandamus (Pet. App. A, 1a).

SUMMARY OF ARGUMENT

The remand of a removed suit is controlled by 28 U.S.C. § 1447(c) and 1441(c) which set forth the exclusive grounds for remand. Section 1447(c) permits remand only if the case was removed "improvidently and without jurisdiction." Section 1447(c) is the most recent statutory expression of Congress' long-standing intent to narrowly prescribe the remand authority of the federal courts. Neither Section 1447(c) nor its predecessors ever permitted the remand of a properly removed case for discretionary reasons. The only other basis for remand is found in 28 U.S.C. § 1441(c), which deals not with remand of an entire action but permits remand of certain claims that are separate and independent of the claims that formed the basis of federal jurisdiction. The courts below found that Section 1441(c) is inapplicable here because all of the claims arose from the same nucleus of operative facts.

This Court recognized the Congressional directive of Section 1447(c) in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), and held that a case removed under 28 U.S.C. § 1446 may be remanded only in accordance with 28 U.S.C. § 1447(c). The *Thermtron* conclusion that Section 1447(c) provides the exclusive grounds for remand of a removed case is consistent with prior law and the legislative history of the removal statutes, as well as sound policy reasons. Any other result would nullify the removal statutes by remand orders having no warrant in the law and would disregard the Congressional judgment as to the statutory jurisdiction and powers of the federal courts. There is no general or inherent power or authority available to a district court to remand a removed case—other than the power to remand specified in the removal statutes.

Because the powers of removal and remand exist by reason of the removal statutes, they should not and cannot be subject to discretionary exceptions or qualifications. Creation of a discretionary power to remand, where none is specified in the statute, would be contrary to the strict construction the removal statutes must be given. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941); *Cook v. Weber*, 698 F.2d 907 (7th Cir. 1983), relying upon *Shamrock Oil & Gas*. Furthermore, if a district court can remand solely as a matter of its discretion, then the narrow delineation of the circumstances for remand provided in Section 1447(c) would be rendered meaningless.

There are also sound policy considerations supporting the Congressional judgment as to the narrow circumstances of remand. For example, the recognition of a discretionary power to remand cases would—as the merits panel majority below recognized—create an unwieldly situation with no effective boundaries to control the exercise of that discretion (Pet. App. B. 16a).

Also, permitting the remand of properly removed actions, once the federal questions have been withdrawn, could wrongly allow the plaintiff to manipulate the forum in which litigation will be conducted. *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938). Such manipulation results not only in additional delay and expense to a defendant, but also is a needless burden upon the proceedings and resources of both the federal and state judiciary. In this regard it should be noted that, at the very outset of the litigation, the plaintiff has the initial decision regarding whether to subject himself or herself to federal jurisdiction by determining whether to include federal claims in the complaint. If a state forum is more important to a plaintiff than his or her federal claims, that assessment should be made before drafting the complaint in order to avoid the inevitable delays, needless proceedings and duplicative work that an initial filing in a state court, removal to federal court, withdrawal of the federal claims, and remand to the state court surely will entail.

Thus, objections by the Boyles or other plaintiffs, because they may be faced with the possibility of remaining in federal court after dismissal of their federal claims, should not be accorded significant concern. Moreover, the possibility of any adverse effect upon plaintiffs that may result from dismissal of a case, rather than remand, can be avoided either by retention of the case by the federal court, where appropriate, or by the enactment of state savings statutes dealing with the statute of limitations effect of dismissal of pendent state claims.

Finally, this Court's decision in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), does not supply the authority or independent basis for remand of a properly removed case that those courts which have failed to apply *Thermtron* have erroneously suggested. *Gibbs* did not involve or discuss the removal statutes or either the remand or transfer of a case from federal to state court. *Gibbs* involved a situation where there had been an involuntary dismissal of the federal claims; it neither presented nor contemplated a tactical dismissal by the plaintiff as here. In fact, *Gibbs* reflects an abhorrence of the notion that a plaintiff could manipulate the forum. *Gibbs* concerned the power in the federal courts to exercise pendent jurisdiction and hear the whole case whenever there is a claim arising under federal law, and the power to dismiss the case. However, the existence of the power to hear or dismiss related state claims in no way creates a power to remand or transfer them back to state court, whether in a removed case or in a case originally filed in the district court.

Thus, the exclusive statutory provisions of 28 U.S.C. § 1447(c), the decision of this Court in *Thermtron* and sound policy reasons establish that remand of a case should not be permitted except for the reasons specified in 28 U.S.C. § 1447(c). Because the district court and both the majority and dissent of the merits panel have held that the reasons for remand specified in Section 1447(c) have not been met here, a writ of mandamus should have been issued by the court of appeals directing the district court to vacate its order remanding this case to the state court.

ARGUMENT

I. 28 U.S.C. § 1447(c) Sets Forth The Exclusive Grounds For Remand Of A Removed Case.

There is no general or inherent power or authority available to a federal district court to remand a properly removed case for reasons not specified in the controlling statute. Rather, the authority for removal of cases has always been statutorily defined in a precise fashion, beginning with the first Judiciary Act. *St. Paul Mercury Indemnity Co.*, 303 U.S. at 286; *Thermtron*, 423 U.S. at 344. As such, the removal statutes must be strictly construed. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-109 (1941); *Cook v. Weber*, 698 F.2d 907, 909 (7th Cir. 1983), relying upon *Shamrock Oil & Gas*. This is entirely consistent with the established principle that the federal courts, as opposed to the state trial courts of general jurisdiction, are courts of limited jurisdiction as set by Congress. *Aldinger v. Howard*, 427 U.S. 1, 15 (1976); U.S. CONST. art. III. This constitutional principle was also recognized by the merits panel majority in the present case (Pet. App. B, 16a).

The statutory framework, found in Title 28 of the United States Code, provides for remands only in two situations. Section 1447(c) provides for remand of an entire action if it is determined that the case was removed "improvidently" and "without jurisdiction".[4] Section

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[4] Section 1447(c) provides in pertinent part:

> If at any time before final judgment it appears that the case was removed *improvidently* and *without jurisdiction*, the district court shall remand the case . . .

28 U.S.C. § 1447(c) (emphasis added).

1441(c) provides for remand of certain claims which constitute separate and independent claims.[5] Here, the district court and both the panel majority and dissent found that C-MU and Kordesich properly and timely removed this case based upon the existence of a federal question as pled in the Boyles' complaint (Pet. App., F, 31a; B, 10a).

In *Thermtron*, this Court adhered to the Congressional directive of Section 1447(c) and held that the district court had "exceeded its authority in remanding [the case] on grounds *not permitted* by the controlling statute." 423 U.S. at 345 (emphasis added). This Court found that result to be consistent with prior law and the legislative history of the removal and remand statutes which it thoroughly discussed. 423 U.S. at 344-50. This Court recognized that Congress has always carefully delineated the narrow circumstances permitting remand of a removed case. The statutory language and legislative history of the precedessors to Section 1447(c), analyzed by this Court in *Thermtron*, establish that none of those statutes ever permitted remand of a properly removed case for discretionary reasons. 423 U.S. at 344-51. Similarly, in *St. Paul Mercury Indemnity Co.*, 303 U.S. at 291-93, *Pullman Co. v. Jenkins*, 305 U.S. 534, 537 (1939), and *Phelps v. Oaks*, 117 U.S. 236, 238-39 (1886) citing *Stewart v. Dunham*, 115 U.S. 61 (1885), all of which involved the predecessor statutes to Section 1447(c), this Court refused to allow remands which had been based upon events subsequent to the removal, such as the amending of a complaint, a reduction in the damages sought below the jurisdictional amount or joinder of a party. These prior holdings indicate the absence of a power to remand for reasons not specifically authorized by the removal statutes. Thus, *Thermtron* was consistent with long-standing precedent of this Court.

In *Thermtron*, the district court had remanded a properly removed case because of its congested docket. 423 U.S. at 339. The Sixth Circuit denied a petition for writ of mandamus. *Id.* at 341-42.[6] This Court granted a petition for writ of certiorari and reversed the Sixth Circuit. *Id.*, at 342. As this Court held:

> Section 1446 provides the procedure for removal; and a case removed under that Section may be remanded only in accordance with § 1447 which governs procedure after removal.

Id.,. at 342. In strong terms, this Court expressed its view that Congress never intended to vest a district court with the unbridled discretion to revise the removal statutes by remanding cases on grounds which seem appropriate to it:

> But we are not convinced that Congress ever intended to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases *on grounds that seem justifiable to them but which are not recognized by the controlling statute*... Because the District Judge remanded a

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[5] Section 1441(c) provides:

> Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

28 U.S.C. 1441(c).

[6] In *Thermtron*, the Sixth Circuit denied the petition for writ of mandamus because it held that it had no jurisdiction to review the district court's remand order or to issue mandamus in light of the prohibition against appellate review contained in 28 U.S.C. § 1447(d). 423 U.S. 341-42. This Court, besides ruling on the merits that the remand was improper, held that Section 1447(d) did not bar review of the remand order by mandamus where the remand was based on a ground not set forth in 28 U.S.C. § 1447(c). *Id.*, at 351.

> properly removed case on grounds that he had no authority to consider, he exceeded his statutorily defined power; and issuance of the writ of mandamus was not barred by § 1447(d).

423 U.S. at 351 (emphasis added).

By ignoring the plain meaning of Section 1447(c) and the strong dictates of *Thermtron*, the district court's remand order in this case was clearly erroneous as a matter of law. We submit that the Congressional intent to limit the remand authority of the federal courts, as manifested in Section 1447(c) and its predecessors, and this Court's decision in *Thermtron*, clearly establish the impropriety of remand for reasons other than those set forth in the controlling statute.[7]

Permitting remands for reasons other than those specified in the removal statute would negate Congress' longstanding effort to carefully delineate the narrow circumstances in which remand is to be permitted. As recognized by this Court in *Thermtron*, permitting remand for reasons other than those in Section 1447(c) nullifies the provisions of the removal statutes. 423 U.S. at 351-53. This disregards the Congressional judgment as to the statutory jurisdiction and powers of the federal courts.

As creations of statute, removal and remand should not and cannot be subject to discretionary exceptions or qualifications. To inject an element of discretion into removal or remand, where none is present or intended, would be contrary to the strict construction these statutes must be given. *Cook*, 698 F.2d at 909, relying upon *Shamrock Oil & Gas Corp.*, 313 U.S. at 108-09. Furthermore, if a district court can remand solely as a matter of its discretion, then the narrow delineation of the circumstances for remand provided in Section 1447(c) would be rendered meaningless. This would be contrary to the established rule that where, as here, the statutory language is susceptible of a construction preserving its usefulness, the "judicial duty is to give expression to the intendment of the law." *Armstrong Co. v. Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938).

In addition to nullification of a Congressional judgment as to the narrow circumstances of remand, the recognition of a discretionary power to remand cases would—as the merits panel majority below determined—create an unwieldly situation with no effective boundaries to control the exercise of that discretion (Pet. App. B, 16a).

Moreover, Congress could have easily provided, through statutory language, a power to remand in situations other than those in Section 1447(c), such as where the federal claim was dismissed, or even could have provided a general discretionary power to remand. In fact, Congress chose to provide language in 28 U.S.C. § 1441(c) allowing remands at the district court's discretion in situations involving state claims separate and independent from the federal claims. However, no such discretionary language was provided in 28 U.S.C. § 1447(c). This Congressional judgment should be respected.

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[7] Three circuits have recognized the exclusivity of the grounds for remand set forth in the removal statute. *E.g.*, *Ryan v. State Bd. of Election*, 661 F.2d 1130, 1134 (7th Cir. 1981); *Cook v. Weber*, 698 F.2d 907, 909 (7th Cir. 1983); *In re Greyhound Lines, Inc.*, 598 F.2d 883, 884-85 (5th Cir. 1979); *In re Shell Oil Co.*, 631 F.2d 1156, 1158 (5th Cir. 1980); *Sheet Metal Workers v. Seay*, 693 F.2d 1000, 1001-06 (10th Cir. 1982), *modified on other grounds on reh'g*, 696 F.2d 780 (10th Cir. 1983); *contra*, *In re Romulus Community Schools*, 729 F.2d 431, 435-40 (6th Cir. 1984); *Fox v. Custis*, 712 F.2d 84, 89-90 (4th Cir. 1983); *Hofbauer v. Northwestern Nat. Bank*, 700 F.2d 1197, 1201 (8th Cir. 1983); *Naylor v. Case & McGrath, Inc.*, 585 F.2d 557, 561-62 (2d Cir. 1978); *IMFC Professional Services, Inc. v. Latin American Home Health, Inc.*, 676 F.2d 152, 159-60 (former 5th Cir. 1982). In a subsequent opinion, the Fifth Circuit indicated that *In re Greyhound Lines, Inc.*, is still good law. *Boelens v. Redman Homes, Inc.*, 759 F.2d 504, 507 n.2 (5th Cir. 1985).

This Court also has long recognized the importance of guarding against manipulation of the forum that could deny a defendant the protection of the removal statutes. In *St. Paul Mercury Indemnity Co.*, which concerned a predecessor to 28 U.S.C. § 1447(c), *i.e.*, Section 37 of the Judiciary Act of 1911, the Seventh Circuit had held that a district court should have remanded to state court a properly removed diversity case after the plaintiff filed a second amended complaint with an exhibit indicating that the plaintiff's damages were less than the requisite jurisdictional amount. 303 U.S. at 285. This Court, in reversing the Seventh Circuit, held that:

> If the plaintiff could, no matter how bona fide his original claim in the state court, reduce the amount of his demand to defeat federal jurisdiction the defendant's supposed statutory right of removal would be subject to the plaintiff's caprice. The claim, whether well or ill founded in fact, fixes the right of the defendant to remove, and the plaintiff ought not to be able to defeat that right and bring the cause back to the state court at his election.

303 U.S. at 294.

Similarly, a number of decisions from the lower federal courts have recognized this important policy interest. *E.g., Boelens v. Redman Homes, Inc.*, 759 F.2d 504, 507 (5th Cir. 1985) ("The rule that a plaintiff cannot oust removal jurisdiction by voluntarily amending the complaint to drop all federal questions serves the salutary purpose of preventing the plaintiff from being able to destroy the jurisdictional choice that Congress intended to afford a defendant in the removal statute."); *Westmoreland Hosp. Assn. v. Blue Cross of Western Pennsylvania*, 605 F.2d 119, 123 (3d Cir. 1979), *cert. denied*, 444 U.S. 1077 (1980) ("[a] subsequent amendment to the complaint after removal designed to eliminate the federal claim will not defeat federal jurisdiction"); *In re Greyhound Lines*, 598 F.2d 883, 884 (5th Cir. 1979) (remand order cannot be supported by plaintiff's voluntary tactical dismissal of federal claims; plaintiff cannot precipitate a remand of the action by amending complaint to eliminate federal claim).[8]

This possibility of manipulation can lead to the jockeying of a case from state court to federal court and back to state court with a concomitant drain on the federal and state judiciary and on the parties. It represents a needless burden upon the proceedings and resources of both the federal and state judiciary. A plaintiff has the initial decision as to the forum or forums in which the litigation may be conducted when deciding what claims should be included in the complaint. If a state forum is more important to a plaintiff than his federal claims, then that assessment should be made before drafting the complaint to thereby avoid the inevitable delays, needless proceedings and duplicative work which the transfer of cases from state to federal court and their subsequent remand inevitably entails.

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[8] *See also Austwick v. Bd. of Education*, 555 F. Supp. 840, 842 (N.D. Ill. 1983) ("The policy behind this rule [against manipulating the forum] is obvious. When a plaintiff chooses a state forum, yet also elects to press federal claims, he runs the risk of removal . . . . tactical manipulation such as plaintiff has employed cannot be condoned."); *Barrett v. McDonald's of Oklahoma City*, 419 F. Supp. 792, 793 (W.D. Okla. 1976) ("Once a case has been properly removed a Plaintiff cannot successfully do anything to defeat federal jurisdiction and force a remand"); *Espino v. Volkswagon de Puerto Rico, Inc.*, 289 F. Supp. 979, 982 (D.C. Puerto Rico, 1968) (a plaintiff's amending of complaint to delete federal claims cannot "circumvent jurisdiction previously acquired at the time of removal"); *Jacks v. Torrington Co.*, 256 F. Supp. 282, 287 (D.C. So. Car. 1966) (a federal court's continued jurisdiction after proper removal simply is "not . . . to be determined at the whim and caprice of the plaintiff by manipulation of the Complaint by amendment").

In the present case, for example, after litigating this matter in federal court for seven months, the Boyles, through their motion to amend the complaint, sought to obtain a remand to state court and thereby avoid further disposition of this case in the federal system. However, forum manipulation by amendment and remand should not be possible under the removal statutes. *St. Paul Mercury Indemnity, Co.*, 303 U.S. at 294. Plaintiffs, such as the Boyles, should not be heard to object if they are forced to litigate their remaining state claims in federal court, because it was their initial decision to include federal claims in their complaint that caused the removal. Further, any concern about possible adverse statute of limitations effects upon state law claims that would result from a dismissal, rather than a remand, can be avoided in two ways. First, the federal court may retain the state law claims where it determines appropriate, even after dismissal of the federal claims.[9] Second, the matter of the statute of limitations effect upon dismissed state law claims would seem particularly to be a matter of state interest. Accordingly, as recognized by the merits panel majority, the states can enact savings statutes to deal with that issue if, and in the manner, their legislatures deem appropriate (Pet. App. B, 17a).[10]

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[9] *See, e.g., United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966); *In re Greyhound*, 598 F.2d at 884-85.

[10] Pennsylvania, for example, has enacted a general savings statute regarding application of the statutes of limitations to reinstitution of

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Thus, in summary on this point, both the Congressional judgment reflected in the removal statutes and this Court's decision in *Thermtron*, that remands are not permitted for reasons other than those specified in Section 1447(c), are supported by strong policy reasons and should not be altered or disregarded.

II. This Court's Decision In *United Mine Workers v. Gibbs* Does Not Provide An Independent Basis For Remand.

The Sixth Circuit's decision in *In re Romulus Community Schools*, 729 F.2d 431 (6th Cir. 1984) and the merits panel dissent in this case suggest that this Court's decision in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), provides a basis for permitting remands.[11] This

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previously dismissed causes of action. That savings statute is not limited to actions transferred to the federal courts. The Pennsylvania legislature has indicated, therein, its apparent disfavor regarding protection of suits terminated by the actions of the plaintiff, since the statute explicitly excludes from its protection, *inter alia*, "voluntary nonsuit[s]" and "discontinuance[s]." 42 Pa. Cons. Stat. Ann. § 5535(a)(2)(ii) (Purdon 1981). The Boyles' actions here, which amount to either a voluntary non-suit or a discontinuance of their federal suit, would not be protected under the Pennsylvania savings statute. Thus, the Pennsylvania savings statute would not have protected the filing of a subsequent complaint by the Boyles in state court should there have been a dismissal, rather than a remand, of their suit. The filing of a new action regarding the Boyles' tort claims is now time-barred under the Pennsylvania statute of limitations regarding tort actions. 42 Pa. Cons. Stat. Ann. § 5524 (Purdon 1981 & Supp. 1986).

[11] The merits panel dissent in this case concluded that "specific statutory authority is not necessary [to remand] and that this matter is governed by *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) rather than *Thermtron* . . ." (Pet. App. B, 18a). Under the Third Circuit's Orders subsequently vacating the panel majority opinion and denying the petition for a writ of mandamus, the district court is, in fact, being

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interpretation of *Gibbs* is erroneous for a number of reasons.

First, as discussed above, *Thermtron* held that Section 1447(c) provides the exclusive grounds for remand of a removed case—a result consistent with prior law, as well as based upon sound policy reasons. Second, *Gibbs* does not discuss the removal statutes, remands, or even the transfer of cases. It certainly does not undercut the clear holding of *Thermtron*, decided ten years after *Gibbs*, that remands are permitted only for the reasons specified in the removal statute.

Gibbs involved a situation where there had been an involuntary dismissal of the federal claims; it neither presented nor contemplated a tactical dismissal by the plaintiff as here. In fact, *Gibbs* reflects an abhorrence of the notion that a plaintiff could manipulate the forum. This Court in *Gibbs* noted that a plaintiff should not be permitted to "impose" upon the court a choice of forum by the nature of the pleadings (there the manipulation hypothesized was an attempt by a plaintiff to impose federal court jurisdiction by the shaping of the pleadings). 383 U.S. at 726-27. Further, although *Gibbs* involved the converse of the instant situation—an attempt to obtain federal court jurisdiction rather than escape it—we presume that there is equal abhorrence of the potential for either type of manipulation.

Gibbs was not a removal case. As previously discussed, removal jurisdiction is based entirely upon statutes which are to be strictly construed. *Cook*, 698 F.2d at 909, *citing Shamrock Oil & Gas*, 313 U.S. at 108-09. *Gibbs* did not involve the issue of a remand of claims to a state court. *Gibbs* merely concerned the power of a district court to retain or dismiss state claims after a federal claim is dismissed. Certainly, the power to retain the state claims in federal court does not suggest any power to remand them.

Similarly, the recognition in *Gibbs* of the power to dismiss such claims does not imply a power to remand them. Dismissal of an action is a power traditionally available to the district courts. *E.g.*, Fed. R. Civ. P. 12(b) and (h) and 41. Indeed, a district court's inherent power to dismiss a case is of ancient origin, having its roots in judgments of *non-suit* and *non-prosequitur*. *Link v. Wabash Railroad*, 370 U.S. 626, 630 (1962). There is no comparable traditional power in the federal courts to transfer or remand cases to the state courts. To the contrary, powers to remand have been established by statutory provision. Moreover, remand of an action is not the functional equivalent of a dismissal. There are crucial distinctions between remand and dismissal, affecting, *inter alia*, the application of the statute of limitations, the priority of the case upon its return to state court, and even the right to and scope of appellate review of the district court's order. *Cook*, 698 F.2d at 908.

Thus, this Court's decision in *Gibbs* did not and could not create a power to remand a removed action, which is statutory in nature. A district court should not be permitted to remand a case for reasons other than those specified in the controlling statute. *Thermtron*, 423 U.S. at 342.

(Continued)
permitted to remand this case even though there is no statutory authority permitting such action.

CONCLUSION

For all of the foregoing reasons and cited authorities, it is respectfully requested that the November 24, 1986 Order of the United States Court of Appeals for the Third Circuit denying the petition for writ of mandamus be reversed and that the case be remanded for further proceedings consistent with this Court's opinion.

Respectfully submitted,

*WALTER P. DEFOREST III
MARK A. FONTANA
REED SMITH SHAW & McCLAY
Mellon Square
435 Sixth Avenue
Pittsburgh, PA 15219
(412) 288-3383
Counsel for Petitioners
Carnegie-Mellon University
and John Kordesich

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**Counsel of Record*
for Petitioners

RESPONDENT'S

BRIEF

Supreme Court, U.S.
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No. 86-1021

In the Supreme Court of the United States

October Term, 1986

CARNEGIE-MELLON UNIVERSITY
and JOHN KORDESICH,
Petitioners,

v.

HONORABLE MAURICE B. COHILL, JR.,
United States District Judge,
Nominal Respondent,

and

WILLIAM BOYLE and CARRIE BOYLE,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS

ALLAN J. OPSITNICK
527 Court Place
Pittsburgh, Pennsylvania 15219
(412) 391-3299

Counsel for Respondents
William and Carrie Boyle

BEST AVAILABLE COPY

QUESTION PRESENTED

Respondents agree with the statement of the question presented by Petitioners in their Brief.

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS

OPINIONS BELOW

Respondents adopt the Opinions Below as set forth by Petitioners, as accurate.

STATEMENT OF JURISDICTION

Respondents adopt the Statement of Jurisdiction as set forth by Petitioners.

STATUTES INVOLVED

Respondents adopt the Statutes Involved as set forth by Petitioners.

STATEMENT OF THE CASE

Respondents agree with the Statement of the Case as set forth by Petitioners. However, Petitioners attempt to create the inference that there was bad faith by Respondents in deleting federal claims from their Complaint.

As a result of the depositions of Respondents, it became clear that the federal claims and certain state claims raised were not viable.

Consequently these claims were amended from the Complaint. This was done because these claims were without substantial merit, not to manipulate the forum where the case would be heard.

In addition, considerable discovery and pretrial motions have not yet been completed. The assertion by Petitioners to the contrary is false.

SUMMARY OF ARGUMENT

The District Court did not act improperly or beyond the scope of its power when it remanded the instant case to state court. In its opinion, the District Court stated that the case did not fall within the statutory provisions for remand, but the authority for remand was the discretionary doctrine of pendent jurisdiction.

Although it would appear from Thermtron Products Inc., v. Hermansdorfer, 423 U.S. 336 (1976) that statutory grounds must exist to remand, a closer reading of Thermtron reveals that the District Court in that case remanded for a very narrow and arbitrary reason. The sole reason for remand in Thermtron was docket overcrowding in the District Court. Following Thermtron, Courts have both strictly adhered to and enlarged upon its holding.

The cases strictly following Thermtron have also been forced to deal with very specific reasons for remand, while those giving Thermtron a more broad interpretation have tended to allow remand once Federal questions have been deleted. In In Re Romulus

Schools, 729 F.2d 431 (6th Cir. 1984); a case factually similar to the one at bar, the Court specifically stated that the intent of Thermtron was not to totally deprive the courts of their discretion with regard to remand. Romulus also held remand was proper in cases of pendent jurisdiction, without reliance upon statute. In Fox v. Curtis, 712 F.2d 84 (4th Cir. 1983), the Court explained that, because the District Court is permitted to dismiss state claims once federal claims no longer exist, fairness and expediency permit remand to state court.

In the present case, the state and federal claims arise out of the same nucleus of operative facts. Thus after dismissal of federal claims, the District Court continued to have jurisdiction over the remaining state claims pursuant to the doctrine of pendent jurisdiction. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

Pendent jurisdiction is a doctrine of discretion. "Its justification lies in considerations of judicial economy, convenience, and fairness to the litigants . . ." Gibbs, 383 U.S. 726 (1966). The factors courts are to consider in deciding whether or not to exercise pendent jurisdiction are:

(1) Whether the Federal claims were dismissed before trial;

(2) Whether state claims predominate;

(3) Whether the state claims are closely tied to questions of Federal policy; and

(4) Whether a jury is likely to be confused by divergent legal theories of relief. Id. at 726-27.

In considering these factors in the case at bar, the District Court concluded that it was clear that state claims predominated; the present action was not at the point of trial, and that the state claims implicate no important questions of Federal policy. Based upon these considerations the District Court's remand of this case back to state court was proper.

ARGUMENT

The District Court did not exceed its power when it remanded the instant case to the Court of Common Pleas of Allegheny County, Pennsylvania, even though it did so for reasons other than those set forth in 28 U.S.C. Sections 1441(c) and 1447(c).

Petitioners cite Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, (1976) as the leading case upon which their request for relief is founded. Thermtron must be examined in detail.

In that case the District Court remanded the matter to state Court solely on the ground that the Court's heavy docket would unjustly delay trial. The Sixth Circuit affirmed while this Honorable Court reversed. While, in its opinion, this Honorable

Court, by Justice White stated ". . . we are not convinced that Congress ever intended to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute," (423 U.S. at 351), only the very narrow reason for remand, that is, an overcrowded docket, was considered. Nowhere in Thermtron is there language expansive enough to encompass a dissimilar factual situation. Thermtron therefore cannot, of and by itself, justify the extraordinary remedy of mandamus in the present case.

The statutes referred to in *Thermtron* were 28 U.S.C. Sections 1441 and 1447. They read, in pertinent part:

> Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction... 18 U.S.C. Subsection 1441(c);
>
> If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case...18 U.S.C. Section 1447(c).

Circuit Court cases strictly following the *Thermtron* reasoning and result, permitting remand only when grounded upon statute (for example,

Ryan v. State Bd. of Elections of State of Ill., 661 F.2d 1130 (7th Cir. 1981); *Cook v. Weber*, 698 F.2d 907 (7th Cir. 1983); and *Levy v. Weissman*, 671 F.2d 766 (3d Cir. 1982)), are factually similar to *Thermtron* in that the reasons for remand were not based upon *any* proper authority.

A case which followed the *Thermtron* result but expanded upon its reasoning is *IMFC Professional, Inc. v. Latin American Home Health, Inc.*, 676 F.2d 152 (5th Cir. 1982). The holding in this case would permit remand at the court's discretion if "based on clearly articulated authority" and the court goes on to say that abstention and pendent jurisdiction are two such authorities and that "the discretionary element that inheres in (pendent jurisdiction) allows remand of non-federal issues." Pendent jurisdiction is the authority upon which the District Court, in the present case, based its decision to Order remand. This Honorable Court, explaining the reasoning behind pendent jurisdiction has stated:

> Its (pendent jurisdiction's) justification lies in consideration of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them. Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties...
>
> United Mine Workers v. Gibbs, 383 U.S. at 726, (1966).

Factors to be considered when deciding the application of pendent jurisdiction are:

(1) Whether the federal claims were dismissed before trial;

(2) Whether state claims predominate;

(3) Whether the state claims are closely tied to questions of federal policy; and

(4) Whether a jury is likely to be confused by divergent legal theories of relief. Id. at 726-27.

An examination of these factors indicates that a proper application of pendent jurisdiction will give rise to less arbitrary and less capricious reasons for remand than that of Thermtron and its progency. In Fox

v. Curtis, 712 F.2d 84 (4th Cir. 1983), after its discussion of 28 U.S.C. Subsection 1441(c) and 1447(c) the Court stated "...we think the mere fact that Congress has only seen fit specifically to speak to the matter of remand in these two circumstances does not compel the conclusion that it has forbidden remand to state courts of pendent state claims once a proper discretionary decision not to entertain them in federal court has been made." It is for this reason that it would seem logical to conclude that this Honorable Court, in Thermtron, did not intend to rob trial courts of their discretion to properly remand the cases.

Some cases hold that permitting remand of pendent state claims denies a party the benefits of the removal

statute and encourages manipulative dismissals. In In Re Greyhound Lines, Inc., 598 F.2d 883 (5th Cir. 1979), the Circuit Court held that a district court should have no authority to remand a case where the motion is predicated on a "voluntary tactical dismissal of the federal claims by the plaintiff," 598 F.2d 884, n.1. However:

> The decision to remand should be governed by the same considerations of fairness and judicial economy that temper the dismissal of a case under pendent jurisdiction. The possibility of harmful "jockeying" appears greatest where there has been a substantial commitment of judicial resources in the federal court. Determining when such dilatory tactics have occurred and when the effects of such tactics outweigh considerations of comity, is best left to the sound discretion of the district court. A flat ban

> against discretionary remands would only limit the flexibility of the district court to meet these conflicting demands.
>
> In Re Romulus Community Schools, 729 F.2d 431, 440 (1984).

The record before this Honorable Court is devoid of any indication that the deletion of certain federal and state claims and damage allegations was to manipulate the lower Court and forum shop. On the contrary, the opinion of the District Court indicates the deletion of claims and request for remand was proper and warranted under the circumstances. In addition, it is axiomatic that an attorney has an ethical obligation to eliminate claims of dubious merit.

While Petitioners urge acceptance of the holding of In Re Greyhound Bus

Lines, Inc., 598 F.2d 883 (5th Cir. 1979) for the proposition that a party "... cannot precipitate a remand of the action by amending the Complaint to eliminate the federal claim." In another 1979 decision it was held that "as a general rule, a plaintiff has the prerogative of determining the theory of his action and in the absence of fraud may defeat removal to federal court by avoiding allegations which provide the basis for assertion of federal jurisdiction." Sheeran v. General Electric Co., 593 F.2d 93 (9th Cir. 1979). Remand of cases following the removal of federal claims has been repeatedly permitted. Naylor v. Case & McGrath, Inc., 585 F.2d 557 (2d Cir. 1978); Overman v. United States, 563 F.2d 1287 (8th Cir. 1977); and Hofbauer v.

Northwestern National Bank of Rochester, 700 F.2d 1197 (8th Cir. 1983).

Also, the case of In Re Carter, 618 F.2d 1093 (5th Cir. 1980) stands for the proposition that pendent jurisdiction is applicable to remand cases which were removed initially.

In In Re Romulus Community Schools, supra., the district court remanded the case after the sole federal claim was dropped. The court did not rely upon statute, but rather the doctrine of pendent jurisdiction. In so doing, the court acted under its authority to dismiss pendent state claims once federal grounds of jurisdiction are eliminated. This idea of remand versus the dismissal is an important one. Justice Brennan in United Mine Workers v. Gibbs, supra., stated: "...if the

federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." While Gibbs uses the term "dismiss" rather than "remand," Fox v. Curtis, supra., discusses the reasons why remand is more appropriate in some circumstances. In Fox, the court held that dismissal and remand are "... the same as far as any discernable federal interest is concerned." Remand is more direct, less costly and "... more protective of the plaintiff who originally chose the state forum."

In the present case the District Court recognized that the dismissal of federal claims left only issues of state law to be tried. The District Court would have been clearly justified in dismissing the case without prejudice, leaving the plaintiffs to pursue their claims in the state forum they now seek. However, a significant concern arises as to the adverse affects of the statute of limitations upon the remaining state claims. The statute of limitations has expired on these claims. Although the District Court might retain jurisdiction of state law claims where appropriate, the federal court is left litigating a case without any federal interest involved. In addition, if the District Court would dismiss the case it is doubtful that the Pennsylvania general savings statute, (42 Pa. Cons. Stat. Ann. § 5535(a)(2)(ii), (Purdon 1981)), regarding application of the statute of limitation to reinstitution of previously dismissed causes of action

would apply. Therefore the Pennsylvania Savings Statute may not protect the filing of a subsequent complaint by the Respondents in state court should there be a dismissal rather than a remand of their suit, leaving Respondents in a precarious position, which should, as a matter of policy be avoided at all costs.

After careful consideration of the applicable law it is clear that the District Court acted fairly and within the limits of its authority in remanding the instant case to state court. The District Court is vested with discretion in this case and utilized its discretion in a proper fashion.

CONCLUSION

Based upon the foregoing argument Respondents request this Honorable Court to affirm the District Court's order remanding the instant case to the Court of Common Pleas of Allegheny County, Pennsylvania, and dismiss the Petition for Writ of Mandamus.

Respectfully submitted,

Allan J. Opsitnick

Allan J. Opsitnick
527 Court Place
Pittsburgh, PA 15219

Counsel for Respondents
William Boyle and
Carrie Boyle

Dated: June 17, 1987

REPLY
BRIEF

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No. 86-1021

In the
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v.
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and
WILLIAM BOYLE and CARRIE BOYLE,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

*WALTER P. DEFOREST III
MARK A. FONTANA
REED SMITH SHAW & MCCLAY
Mellon Square
435 Sixth Avenue
Pittsburgh, PA 15219
(412) 288-3383

Counsel for Petitioners
Carnegie-Mellon University
and John Kordesich

**Counsel of Record*
for Petitioners

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

I. The District Court Had Jurisdiction Over The Removed Action.

The Amici Curiae Brief filed on behalf of the State of California and certain other states[1] urges three alternative arguments as to why the relief request by Petitioners from this Court should be denied.

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[1] These amici will be referred to herein as the California Amici and their brief as the Brief of the California Amici.

The first argument of the California Amici is that this case was improperly removed to the district court without jurisdiction. Neither the Respondents, the district court, nor any of the judges of the United States Court of Appeals for the Third Circuit have suggested that the removal was without jurisdiction, and, in fact, it was not without jurisdiction. The Brief of the California Amici at 4-12 bases this argument upon a totally erroneous reading of 28 U.S.C. § 1441. Without benefit of any precedent so holding, the California Amici contend that if state claims are asserted along with federal claims in a state court suit, then Section 1441(c) is the only statutory mechanism for achieving removal of the action. They then argue that such mechanism was unavailable in the present case since it is undisputed that all of the claims in this case arise from a "common nucleus of operative facts." Under their interpretation, a state court suit—which contains both federal claims and state law claims that would be considered as encompassed within a federal court's original jurisdiction as pendent to the federal claims if the suit had originally been filed in the federal court—could not be removed to the federal court. The California Amici contend that the only suits, containing both federal and state claims, which are subject to removal are those in which the state claims are separate and independent from the federal claim. Their interpretation of the removal statute makes no sense. Cases concerning closely related federal and state claims would not be removed, but ones with unrelated claims would be. The interpretation of the California Amici, if accepted, would largely destroy removal jurisdiction since any competent lawyer usually could draft a state law claim, based upon state statute, contract or tort law, arising out of the same common nucleus of operative facts as the federal claim and thereby insulate the whole suit, including the federal claim, from removal.

Thankfully, the argument by the California Amici is devoid of any statutory underpinning. In reading the statute, the California Amici start in the middle of Section 1441, *i.e.*, paragraph c. However, paragraphs (a) and (b) of Section 1441 both provide for removal of "any civil action" of "which the district courts have original jurisdiction." Certainly, the present suit was such an action, since it contained both a federal claim and pendent state law claims found by the courts below to derive from the same common nucleus of operative facts as the federal claim (Pet. App. F, 32a-33a; Pet. App. B, 10a-12a). The pendent state law claims, as well as the federal claim, were within the original jurisdiction of the federal district courts. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). The treatise writers and the cases have clearly read Section 1441(a) and (b) as authorizing removal of cases involving both federal claims and pendent state claims. *E.g.*, 1A J. Moore & B. Ringle, *Moore's Federal Practice*, ¶0-163 [4.-5], pp. 338-39 (2d ed. 1987); 14A C. Wright & A. Miller, *Federal Practice and Procedure*, § 3724, pp. 399-400 (2d ed. 1985); *Hazel Bishop, Inc. v. Perfemme, Inc.*, 314 F.2d 399, 402-03 (2d Cir. 1963).

The Brief of the California Amici at 9, on this point, also erroneously contends that the present case is very similar to *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951), the seminal decision of this Court on the meaning of the terms "separate and independent claim or cause of action" in Section 1441(c). In *Finn*, plaintiff sued two foreign insurance companies and their resident agent. The case was then removed from Texas state court to federal district court pursuant to Section 1441(c) by the insurance companies. 341 U.S. at 7-8. The court of appeals held that, because the claims against the insurance companies were "separate and independent" from the claim against the resident agent within the meaning of Section 1441(c) and because they would have been removable if sued upon alone on the basis of diversity of citizenship, the case was properly removed. 341 U.S. at 8. This Court reversed, holding that the claims were not separate and independent within the meaning of Section 1441(c) and that, therefore, diversity jurisdiction did not exist. *Id.* at 14-16. Accordingly, because neither Section 1441(c) nor any other provision of Section 1441 could support the removal in *Finn*, the case was remanded to state court. *Id.* Unlike *Finn*, the present case was properly removable under Section 1441(a) and (b). Further, unlike *Finn*, even after the Boyles amended their complaint deleting the federal claim, there can be no dispute that the district court continued to have the power to hear the remaining claims under the pendent jurisdiction doctrine of *Gibbs*.

II. Section 1441(c) Does Not Provide A Basis For Discretionary Remand Of Pendent State Law Claims.

The Brief of the California Amici at 13 also argues that, even if this case were properly removed, the district court could have remanded the state law claims as a matter of discretion under Section 1441(c). The simple answer to this argument is again found in the statute itself. The power to remand under Section 1441(c) applies only to claims removed to the federal court under that provision of the statute. Because this case did not involve the removal from state court of a suit containing separate and independent claims, Section 1441(c) does not even enter

the picture as a basis for remand of the pendent state law claims.[2]

III. The Pendent Jurisdiction Doctrine Does Not Create A Discretionary Power To Remand State Law Claims.

The third argument in the Brief of the California Amici consists of the following syllogism. They argue first that there should be no distinction between the power of federal courts to remand or transfer pendent state law claims in actions that were originally filed in federal court and the power to do so in actions that have been removed to federal court. They then argue that "if federal courts can remand cases that arrive through the front door under their original jurisdiction, *a fortiori*, they can remand cases that arrive through the back door by the removal process." Brief of the California Amici at 18. The California Amici then cite *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), as holding that remand is appropriate even in originally filed actions. Brief of California Amici at 19 n.8.

While Petitioners concur that there is no more power to remand or transfer a removed case back to the state courts, absent a specific statutory authorization to do so, than there would be to transfer pendent claims in an action originally filed in federal court—that, in fact, is the point.

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[2] The Brief of the California Amici erroneously suggests that the circuit courts that have considered this issue have incorrectly considered the "test for removal" under Section 1441(c) rather than what the California Amici suggest as the "test for remand," *i.e.*, district court "discretion" upon which "the statute imposes no limits." Brief of the California Amici at 14-15 and n.6. The circuit courts have not misunderstood this issue. Section 1441(c) and, therefore, the district court's discretion thereunder do not even come into play unless the case involved separate and independent claims that were removed pursuant to Section 1441(c).

There is no such power in actions originally filed in federal court. Similarly, there is no such power in removed actions, absent specific authorization from Congress. *Colorado River Water Conservation District* did not involve a remand. It involved a dismissal of proceedings by the federal court. 424 U.S. at 806, 809. In its discussion of the abstention question, that opinion discussed both dismissals and stays of federal court proceedings. *Id.* at 813-17. It did not state that there was any power to remand. Similarly, *Gibbs* concerned the power of a district court to dismiss the pendent state claims and did not authorize transfers of such claims to a state court.[3] Brief For Petitioners at 21-23.

Thus, to the extent that concerns for abstention arise in a removed action, they can and should be addressed in the same manner as in an action originally filed in federal court—through a stay or dismissal of the state law claims, if appropriate.[4] Concerns for abstention certainly cannot create a power to remand which has not been authorized by statute.

In summary on this point, there is no statutory warrant to permit remands other than in the specific situations set forth in the removal statutes. Moreover, neither *Gibbs* nor *Colorado River Water Conservation District* give rise to a general or inherent power in federal district courts to remand or transfer claims to the state courts. There is simply no power to do so, absent that specifically set forth in the removal statutes.

CONCLUSION

For all of the foregoing reasons and cited authorities, and for the reasons and cited authorities in the Brief for Petitioners, it is respectfully requested that the November 24, 1986 Order of the United States Court of Appeals for the Third Circuit denying the petition for writ of mandamus be reversed and that the case be remanded for further proceedings consistent with this Court's opinion.

Respectfully submitted,

*Walter P. DeForest III
Mark A. Fontana
REED SMITH SHAW & McCLAY
Mellon Square
435 Sixth Avenue
Pittsburgh, Pennsylvania 15219

Counsel for Petitioners,
Carnegie-Mellon University
and John Kordesich

*Counsel of Record for Petitioners

Dated: October 29, 1987

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[3] On a related point, the Brief of the California Amici at 22-23 incorrectly asserts that *Gibbs* held that even the federal claims in an originally filed action can be dismissed when the state claims substantially predominate or when the federal claim is not substantial. There is no such holding or even dictum in *Gibbs* that authorizes dismissal of the federal claims for such reasons.

[4] The abstention doctrine has no direct application to the present case, which does not involve any of the three general categories of abstention as outlined in *Colorado River Water Conservation District*, 424 U.S. at 813-17. This case does not present a situation where, by abstaining, the federal district court may avoid the unnecessary determination of federal constitutional issues. *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). There has been no indication of difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). There is no federal involvement here in state criminal proceedings. *Younger v. Harris*, 401 U.S. 37 (1971).

AMICUS CURIAE

BRIEF

6

Supreme Court, U.S.
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No. 86-1021

In The
Supreme Court of the United States
October Term, 1986

CARNEGIE-MELLON UNIVERSITY
and JOHN KORDESICH,
Petitioners,

v.

HONORABLE MAURICE B. COHILL, JR.,
United States Judge,
Nominal Respondent,

and

WILLIAM BOYLE and CARRIE BOYLE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

AMICI CURIAE BRIEF OF STATES OF CALIFORNIA, ALABAMA, ALASKA, ARKANSAS, HAWAII, IDAHO, INDIANA, KENTUCKY, LOUISIANA, NEVADA, NEW MEXICO, OHIO, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, WASHINGTON AND WISCONSIN IN SUPPORT OF RESPONDENTS

STATE OF CALIFORNIA
John K. Van de Kamp
Attorney General of California
R. H. Connett
Assistant Attorney General
Roderick E. Walston*
Deputy Attorney General
350 McAllister Street,
Room 6000
San Francisco, California 94102
Tel.: (415) 557-3920

* Counsel of Record

(Other states and counsel listed on inside cover)

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
or call collect (402) 342-2831

STATE OF ALABAMA
DON SIEGELMAN
Attorney General of Alabama
Alabama State House
11 South Union Street
Montgomery, Alabama 36130

STATE OF ALASKA
GRACE BERG SCHAIBLE
Attorney General of Alaska
P. O. Box K-State Capitol
Juneau, Alaska 99811

STATE OF ARKANSAS
JOHN STEVEN CLARK
Attorney General of Arkansas
201 East Markham Street
Little Rock, Arkansas 72201

STATE OF HAWAII
WARREN PRICE, III
Attorney General of Hawaii
State Capitol
Honolulu, Hawaii 96813

STATE OF IDAHO
JAMES T. JONES
Attorney General of Idaho
Statehouse, Room 210
Boise, Idaho 83720

STATE OF INDIANA
LINLEY E. PEARSON
Attorney General of Indiana
219 State House
Indianapolis, Indiana 46204

STATE OF KENTUCKY
DAVID L. ARMSTRONG
Attorney General of Kentucky
Capitol Building
Frankfort, Kentucky 40601

STATE OF LOUISIANA
WILLIAM J. GUSTE, JR.
Attorney General of Louisiana
Louisiana Department of Justice
234 Loyola Avenue, 7th Floor
New Orleans, Louisiana 70012

STATE OF NEVADA
BRIAN McKAY
Attorney General of Nevada
Office of Attorney General
Capitol Complex
Carson City, Nevada 89710

STATE OF NEW MEXICO
HAL STRATTON
Attorney General of New Mexico
P. O. Drawer 1508
Santa Fe, New Mexico 87504-1508

STATE OF OHIO
ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio
30 East Broad Street
Columbus, Ohio 43266-1410

STATE OF SOUTH DAKOTA
ROGER A. TELLINGHUISEN
Attorney General of South Dakota
Capitol Building
Pierre, South Dakota 57501

STATE OF TENNESSEE
W. J. MICHAEL CODY
Attorney General of Tennessee
450 James Robertson Parkway
Nashville, Tennessee 37219

(Other states and counsel listed on following page)

STATE OF TEXAS
JIM MATTOX
Attorney General of Texas
P. O. Box 12548
Austin, Texas 78711

STATE OF UTAH
DAVID L. WILKINSON
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114

STATE OF WASHINGTON
KENNETH O. EIKENBERRY
Attorney General of Washington
Temple of Justice
Olympia, Washington 98504

STATE OF WISCONSIN
DONALD J. HANAWAY
Attorney General of Wisconsin
Box 7857
Madison, Wisconsin 53707

Attorneys for Amici Curiae

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HONORABLE MAURICE B. COHILL, JR.,
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and

WILLIAM BOYLE and CARRIE BOYLE,

Respondents.

AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENTS

The amici states file this brief in support of respondents pursuant to Rule 36.4 of the Rules of the Supreme Court, which authorizes filing of an amicus brief by a state without consent of the parties.

INTEREST OF AMICI CURIAE

The amici states have an important interest in this controversy. The question presented is whether federal courts have authority to remand pendent state law issues to state courts in removal cases. The question is important to the amici states because the states believe that, in the interests of comity and justice, the state courts are the proper forum to resolve state law issues.

This principle, that interests of comity support the right of state courts to adjudicate state law issues, underlies the pendent jurisdiction doctrine, which authorizes federal courts to remand pendent state law claims to state courts. This principle also underlies the abstention doctrine, which authorizes federal courts to abstain from considering state law issues in cases involving important issues of state policy, or involving federal constitutional issues that might become moot pending determination of state law issues. These interests are particularly compelling in this case, where the plaintiffs have amended their complaint to delete the single federal law claim on which removal was based. Since this case presents solely issues of state law, and does not involve either a federal question or diversity of citizenship, the state court is the appropriate forum to resolve the case.

In the view of the amici states, the principle of comity on which our federal jurisprudential system is based supports the right of state courts to adjudicate cases involving solely state law issues, as here. In support of this principle, the amici states file this brief supporting the respondents.

SUMMARY OF ARGUMENT

I

Under 28 U.S.C. § 1441(c), a federal claim joined with a state claim cannot be removed to federal court unless the federal claim is "separate and independent" from the state claim. The Court of Appeals panel and the district court concluded that the federal claim here was not "separate and independent" from the state claims. Therefore, this case was improperly removed. The case must be remanded under 28 U.S.C. § 1447(c), which provides that federal courts "shall" remand cases that were "removed improvidently and without jurisdiction."

II

Under 28 U.S.C. § 1441(c), a district court has "discretion" in removal cases to remand all matters "not otherwise within its original jurisdiction." Since the federal claim that provided the basis for removal has been deleted from the complaint, the sole remaining issues consist of state claims that are not "otherwise within its [the district court's] original jurisdiction." Therefore, assuming *arguendo* that the case was properly removed, the district court had statutory discretion to remand the pendent state claims. The removal statutes preclude appellate review of remand orders authorized by statute, 28 U.S.C. § 1447(d), and thus preclude appellate review here.

III

Assuming *arguendo* that the case was properly removed and that the statutes do not provide for remand, the district court had discretion to remand the case under pendent jurisdiction principles. These principles authorize district courts to remand cases to obtain a more accurate interpretation of applicable state laws, particularly where, as here, the case lacks either a federal question or diversity of citizenship. If the result were otherwise, federal jurisdiction in pendent jurisdiction cases would depend on the fortuity of whether the case was a removal case or an original jurisdiction case. There is no logical basis for distinguishing between these cases with respect to federal judicial authority to remand pendent state claims to state courts.

ARGUMENT

I. THE DISTRICT COURT'S REMAND ORDER SHOULD BE SUSTAINED BECAUSE THE CASE WAS IMPROPERLY REMOVED AND THUS IS NOT WITHIN THE JURISDICTION OF FEDERAL COURTS.[1]

In this action, the plaintiffs brought an action in state court against the defendants, alleging that the defendants had unlawfully discriminated against one of the plaintiffs by terminating his employment. The action, although arising out of a single occurrence, alleged relief on several grounds; most of the grounds involved state law, and one involved federal law. Pursuant to 28 U.S.C. § 1441(b), the defendants removed the case to the federal court on the basis of the single federal claim. Pet. App. 8a. The plaintiffs amended their complaint to delete the federal claim on which the removal was based. The district court then remanded the case to the state court, since the case involved only state law claims. The defendants unsuccessfully sought mandamus relief in the Court of Appeals.

After the pleading amendment, the case lacked both a federal question and diversity of citizenship. Under Article III, the federal judicial power, as relevant here, extends only to cases involving a federal question or diversity of citizenship. U.S. Const., Art. III, § 2. Hence, this case potentially raises the question whether Congress, by enacting the removal statutes, has constitutional power to confer federal court jurisdiction over cases that, after a pleading amendment, lack any constitutional basis for federal jurisdiction. As we now explain, the Court need not reach this constitutional question because Congress' removal statutes do not provide for federal jurisdiction here, and in event the case can be properly remanded both under the removal statutes and under the pendent jurisdiction doctrine.

The basic removal statute, as enacted in 1911, authorized removal of civil cases "arising under the Constitution or laws of the United States, or treaties made," that are within the "original jurisdiction" of the federal courts. 36 Stat. 1094 (1911), 28 U.S.C. § 71 (1946 ed.). This statute is now codified, with minor changes, in 28 U.S.C. § 1441 (b). This statute, in its original form, authorized removal of a federal claim raised in a civil case brought in the state courts. The statute was silent, however, with respect to removal of cases involving joinder of both federal claims and state claims. The question whether state claims can be removed in joinder cases involves significant questions concerning pendent federal jurisdiction over state claims. Cf.

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[1] The first two arguments in this brief were not raised by the parties below, but relate directly to the jurisdiction of the district court over the removal action and the jurisdiction of the appellate courts to review the district court action. Since the arguments are jurisdictional, they may be raised at any time.

Barney v. Latham, 103 U.S. 205 (1881); *Hurn v. Oursler,* 289 U.S. 238 (1933). The statute, as enacted in 1911, did not address this jurisdictional question.

Congress addressed the question by enacting legislation in 1948 that defined the circumstances for removal of cases involving joinder of removable and non-removable claims. The enactment, codified in 28 U.S.C. § 1441(c), provides that:

> "When a *separate and independent* claim or cause of action, which would be *removable* if sued upon alone, is joined with one or more otherwise *non-removable* claims or causes of action, the entire case may be removed and the district court may determine all issues therein . . . ." 62 Stat. 937 (1948), 28 U.S.C. § 1441(c) (emphasis added).

Section 1441(c) authorizes removal of claims in joinder cases only if the "removable" claim is "separate and independent" from the "non-removable" claim. Therefore, if a federal claim is not "separate and independent" from a state claim, neither claim is removable. In *American Fire & Casualty Co. v. Finn,* 341 U.S. 6 (1951), this Court, interpreting section 1441(c), stated that:

> "A separate controversy is no longer an adequate ground for removal unless it also constitutes a separate and independent claim or cause of action. [Citations omitted.] *Congress has authorized removal under § 1441(c) only when there is a separate and independent claim or cause of action.*" 341 U.S. at 11-12 (emphasis added).

In *Finn,* this Court defined a "separate and independent" cause of action within the meaning of section 1441(c). According to the Court, a cause of action consists of "one actionable wrong" that gives rise to "one recovery," and arises from a "single wrongful invasion of a single primary right of the plaintiff, . . ." 341 U.S. at 13. The Court stated that:

> "[W]here there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441(c)." *Id.* at 14.

This Court has held in other cases that a "cause of action" encompasses all possible factual circumstances giving rise to a single recovery, whether or not recovery is sought on different "grounds." *Hurn v. Oursler, supra,* 289 U.S. at 247. See also *Baltimore S.S. Co. v. Phillips,* 274 U.S. 316, 321 (1927). Thus, a "separate and independent" cause of action, for purposes of section 1441(c), consists of a single set of factual circumstances giving rise to a single recovery, whether or not the recovery is sought on different grounds.

The concept of a "separate and independent" claim in section 1441(c) appears closely related to the concept of pendent jurisdiction defined in *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966). In *Gibbs,* this Court held that federal courts have pendent jurisdiction over state claims that derive from a "common nucleus of operative fact" with a federal claim. 383 U.S. at 725. If federal and state claims derive from a "common nucleus of operative fact" for pendent jurisdiction purposes, they would appear to be part of the same "cause of action" for purposes of section 1441(c), and thus would not be "separate and independent" within the meaning of the latter provision. In that event, the federal claim would not be removable to the federal courts under section 1441(c).[2]

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[2] It might be argued that a state claim joined with a federal claim is not "non-removable" within the meaning of section

(Continued on following page)

If, on the other hand, the federal and state claims arise from different factual circumstances, they would be "separate and independent" within the meaning of section 1441(c), and hence both claims could be removed to the federal courts. Since the state claim may be beyond the pendent jurisdiction of the federal courts in the latter situation, the federal courts may under some circumstances lack jurisdiction to adjudicate the state claim. Section 1441(c) anticipates this possibility by authorizing the district court, in its "discretion," to remand "all matters not otherwise within its original jurisdiction," which of course includes claims based on state law.

Therefore, the statutory scheme authorizes removal of a federal claim joined with a state claim only if the federal claim is "separate and independent" from the state claim. If this threshold requirement is not satisfied, the federal claim cannot be removed. In this way, Congress intended to narrow the circumstances for removal of federal claims to federal courts, and to allow state courts to adjudicate such claims where they arise from the same factual circumstances as the state claim. Indeed, this Court in *Finn* noted that an "important purpose" of section 1441(c) was to "limit removal from state courts," and to "abridge the right of removal." 341 U.S. at 10. The Court also cited the Reviser's Note, which stated that:

> "Subsection (c) permits the removal of a separate cause of action but not of a separable controversy unless it constitutes a separate and independent claim or cause of action within the original jurisdiction of the United States District Courts. In this respect, *it will somewhat decrease the volume of Federal litigation.*" Reviser's Note, 28 U.S.C. § 1441; *Finn*, 341 U.S. at 10 n. 2 (emphasis added).

In the instant case, both the Court of Appeals panel and the district court held that the federal claim was not "separate and independent" from the state claims within the meaning of section 1441(c). Pet. App. 11a. Since section 1441(c) authorizes removal only of federal claims that are "separate and independent" from state claims, and since this threshold requirement was not met here, this case was improperly removed to the federal courts. The case must be remanded under 28 U.S.C. § 1447(c), which provides that federal courts "shall" remand cases that were "removed improvidently and without jurisdiction."

This case is very similar to the *Finn* case, where this Court held that the removable claim was not "separate and independent" from the non-removable claim and therefore that the case had been improperly removed. In that case, the plaintiff, a Texan, sued two foreign insurance companies and their agent, also a Texan, in a Texas state court. Pursuant to section 1441(c), the insurance companies removed the case to the federal courts on diversity of citi-

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(Continued from previous page)

1441(c) where the state claim is within the pendent jurisdiction of federal courts. If so, section 1441(c) would not apply, since the provision is limited to joinder of removable and "non-removable" claims. In that event, since both claims would be within the "original jurisdiction" of federal courts within the meaning of section 1441(b), both claims could be removed under the latter provision.

This construction, however, is inconsistent with the clear language of section 1441(c). That provision authorizes removal of the entire case only when a removable claim is joined with an "otherwise" non-removable claim. The use of the word "otherwise" indicates that a state claim does not lose its "non-removability" status by joinder with a federal claim. Therefore, whether a claim is "otherwise non-removable" depends on whether it is within original federal jurisdiction if sued upon alone, not whether it is within original federal jurisdicton if joined with a federal claim.

zenship grounds. After judgment was rendered against the insurance companies, the insurance companies sought to vacate the judgment on the ground that the case had been improperly removed. This Court upheld the insurance companies' contention, stating that the claims were not "separate and independent" because "[t]he single wrong for which relief is sought is the failure to pay compensation for the loss of the property." 314 U.S. at 14. Since the case was improperly removed, the Court ordered that the case be remanded to the state courts, even though the district court had already conducted a trial and rendered judgment.

Since, as noted above, the federal claim here is not "separate and independent" from the state claim, this case must also be remanded to the state court, as in *Finn*. The consequences of remand are less harsh here than in *Finn* because, unlike the situation in *Finn,* the district court here has not yet conducted a trial or rendered judgment.[3]

Indeed, it is doubtful that the district court's remand order is subject to appellate review under the removal statutes. Section 1447(d) provides that a remand order is "not reviewable on appeal or otherwise." In *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336 (1976), this Court held that section 1447(d) does not apply to remand orders based on a crowded federal docket, a ground that is not recognized either in the removal statutes or in the pendent jurisdiction doctrine defined in *United Mine Workers v. Gibbs, supra,* 383 U.S. 715. In the instant case, however, the removal was impermissible under section 1441(c);

therefore, the remand is authorized—and indeed required—by section 1447(c), which provides that federal courts "shall" remand cases that have been "removed improvidently and without jurisdiction." Thus, this case, unlike *Thermtron,* involves a statutory ground for remand, and section 1447(d) clearly applies.

The petitioners, by asserting that the case was properly removed under section 1441(b), apparently assume that *any* federal claim can be removed to the federal courts under the latter provision, even when section 1441(c) precludes such removal. In our view, the petitioners have fundamentally misread these two provisions. As noted above, section 1441(c) applies, by its own terms, to cases involving joinder of removable and non-removable claims. Thus, the provision applies where federal claims are joined with state claims. Section 1441(b), on the other hand, applies to cases not otherwise governed by section 1441(c), that is, cases not involving joinder of removable and non-removable claims. Indeed, section 1441(b) is primarily concerned with defining the extent to which diversity of citizenship affects removability, rather than with establishing a federal claim as a separate ground for removal; the provision states that a federal claim may be removed "without regard to the citizenship or residence of the parties," and that other cases may be removed only if "none of the parties" is a "citizen of the State in which such action is brought." Thus, section 1441(b) was not intended to determine the removability of cases involving joinder of federal and state claims, which is the focus of section 1441(c).

If the result were otherwise, sections 1441 (b) and 1441 (c) would be in conflict, for the former would authorize removal of cases that cannot be properly removed under the latter. That is, a federal claim that is not "separate and independent'' from a state claim could be removed under section 1441(b) even though section 1441(c) precludes the removal. In that event, section 1441 (c) would be a nullity, for the restrictions on claims removal contained in the provision would be meaningless. It cannot be imagined that Congress intended in section 1441(b) to abrogate the limits on federal claims removal contained in section 1441(c). The two provisions can be read harmoniously only if section 1441(b) does not apply to cases governed by section 1441(c), and thus does not apply to cases involving joinder of removable and non-removable claims.[4]

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[3] It is immaterial that *Finn* was removed on diversity grounds and the instant case was removed on federal question grounds. Section 1441(c) applies equally to both forms of removal, for it distinguishes between "removable" and "non-removable" claims, not between diversity and federal question claims.

---

[4] Two other arguments should be considered concerning the meaning of section 1441(c). First, it might be argued that the provision does not limit removal of federal claims under section 1441(b), but merely authorizes removal of state claims that are joined with such federal claims. This interpretation, however, is illogical. Under this view, a state claim joined with a federal claim could be removed only if the two claims are "separate and independent," and hence if the state claim is *not* within pendent federal jurisdiction. See *United Mine Workers v. Gibbs, supra,* 383 U.S. at 725. On the other hand, if the two claims are *not* "separate and independent"—and hence if the state claim *is* within pendent federal jurisdiction—the state claim could *not* be removed. In other words, under this interpretation, a state claim that *is* within pendent federal jurisdiction could *not* be removed, and a state claim that is *not* within pendent federal jurisdiction *could* be removed. It cannot be imagined that Congress intended such an illogical, and indeed unconstitutional, result.

Second, it might be argued that section 1441(a), as opposed to section 1441(b), authorizes removal of all federal claims irrespective of whether they are joined with state claims. This interpretation is unlikely, however, for the same reasons that the equivalent interpretation of section 1441(b) is unlikely. Under this interpretation, sections 1441(a) and 1441(c) would be in conflict, for the former would authorize removal of joinder cases that cannot properly be removed under the latter. Section 1441(a) is primarily concerned with identifying the parties that can remove cases and with establishing the venue of federal courts to which cases can be removed, and does not expand the removal of joinder cases beyond the limits contained in section 1441(c).

II. THE REMOVAL STATUTES PROVIDE DISTRICT COURTS WITH DISCRETIONARY AUTHORITY TO REMAND PROPERLY REMOVED STATE CLAIMS TO STATE COURTS, AND PRECLUDE APPELLATE REVIEW OF THE EXERCISE OF SUCH AUTHORITY.

We now assume *arguendo* that the case was properly removed to the federal district court and that the district court had jurisdiction in the matter. Under this assumption, the district court had statutory authority to remand the case to the state court.

Section 1441(c), after providing for removal of "separate and independent" claims, provides that:

> "[T]he district court may determine all issues therein, or, in its *discretion*, may *remand* all matters *not otherwise within its original jurisdiction*" (emphasis added).

Thus, section 1441(c) expressly authorizes the district court, in its "discretion," to remand all state law claims, since such claims are "not otherwise within its original jurisdiction." See note 2, *supra*. This conclusion is supported by the legislative history of section 1441(c), which indicates that, in properly removed joinder cases, "if the district court so desires, it may remand to the State court all nonremovable matters." Reviser's Note, 28 U.S.C. § 1441; *American Fire & Casualty Co. v. Finn, supra,* 341 U.S. at 10 n. 3.

The petitioners assume that the district court lacked statutory authority to remand the state claims to the state court, relying on the analysis of the Court of Appeals panel below. The appellate panel ruled that section 1441(c) "gives district courts discretion to remand 'separate and independent' nonremovable claims or causes of action when those claims are joined with a removable claim.'' Pet. App. 11a. The panel ruled that the state claims were not ''separate and independent'' from the federal claim, and hence could not be remanded under the statute. *Id.*

The appellate panel's analysis is inconsistent with the statute on its face. The statute does *not* say that the state claim can be remanded only if it is ''separate and independent'' from the federal claim. Rather, the statute says that the district court has discretion to remand ''all matters not otherwise within its original jurisdiction'' which obviously includes all state claims.[5] Thus, the statute imposes no limits on the district court's discretion to remand state claims to the state courts. The appellate panel erroneously substituted the *removal* test for the *remand* test, even though the statute clearly distinguishes between the two.[6] That is, the *removal* test is whether the removable

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[5] It could be argued that, since federal courts have pendent jurisdiction over state claims that derive from a "common nucleus of operative fact" with federal claims, *United Mine Workers v. Gibbs, supra,* 383 U.S. at 725, such state claims are not within the category of claims "not otherwise within its [the district court's] original jurisdiction" and hence cannot be remanded under section 1441(c). The reference to claims not "otherwise" within original federal jurisdiction, however, clearly indicates that such claims can be remanded unless they are within original federal jurisdiction if sued upon alone, rather than if joined with a federal claim. Further, as explained in the text above, section 1441 (c) does not authorize removal of pendent state claims in the first place, since the section authorizes removal only of state claims that are "separate and independent" from the removable claim.

[6] Other lower federal courts have, without analysis, also improperly substituted the removal test for the remand test.

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claim is ''separate and independent'' from the non-removable claim, and the ***remand*** test is whether the claim to be remanded is ''not otherwise within its original jurisdiction.'' Since state claims are not ''otherwise'' within the ''original jurisdiction'' of federal courts, the statute grants unfettered authority to district courts to remand such state claims. Moreover, section 1447(d) precludes appellate review of remand orders authorized by the removal statutes. *Thermtron Products, Inc. v. Hermansdorfer, supra,* 423 U.S. 336. Therefore, the appellate courts in this case lack authority to review the district court's order in remanding the state claims.

Therefore, the statutory scheme relating to removal and remand is clear. If a federal claim arises from the same factual circumstances as the state claim—that is, if the claims are not ''separate and independent''—the case cannot be removed at all, and there is no need to provide the district courts with ''discretion'' to remand such cases; such cases, if removed, must be remanded under section 1447(c), which requires remand of cases ''removed improvidently and without jurisdiction.'' If, on the other hand, the federal claim does *not* arise from the same factual cir-

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See *Cook v. Weber,* 698 F.2d 907, 909 (7th Cir. 1983); *In re Romulus Community Schools,* 729 F.2d 431, 434-435 (6th Cir. 1984). In *Romulus,* however, this analysis was dictum because the court held that the district court had authority to remand the case under the pendent jurisdiction doctrine described in *Gibbs.* Other courts have properly held that the removal statutes themselves authorize remand of pendent state claims, even where the case was otherwise properly removed. See *Till v. Unifirst Federal Savings & Loan Ass'n,* 653 F.2d 152, 161-162 (5th Cir. 1981); *Hofbauer v. Northwestern Nat. Bank,* 700 F.2d 1197, 1201 (8th Cir. 1983) (citing and following *Till*).

cumstances as the state claim—that is, if the claims *are* "separate and independent"—both claims can be removed to the federal courts, and the district court has "discretion" to remand the state claim. Indeed, since the claims in the latter situation are, by definition, "separate and independent," the state claim may in some cases be beyond the pendent jurisdiction of federal courts. See *United Mine Workers v. Gibbs, supra,* 383 U.S. at 725. If the state claim is beyond pendent federal jurisdiction, the district court would normally be expected to remand the state claim to the state court, particularly where, as here, the federal claim has been removed from the case and pendent jurisdiction may no longer exist.

III. FEDERAL COURTS HAVE DISCRETION UNDER THE PENDENT JURISDICTION DOCTRINE TO REMAND PROPERLY REMOVED CASES TO THE STATE COURTS, ASSUMING THAT THE REMOVAL STATUTES DO NOT PROVIDE FOR SUCH REMAND.

We now assume *arguendo* that the case was properly removed and that the removal statutes do not provide for remand. Under that assumption, the question would arise, as presented in the petition for writ of certiorari, whether the district court had authority to remand the case to the state courts.[7]

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[7] The question presented in the petition would arise, for example, where a case is properly removed because the federal claim is "separate and independent" from the state claim and the federal claim remains in the case. Section 1441(c), on its face, does not authorize remand of the removable federal claim; it authorizes remand only of issues "not otherwise within its [the district court's] original jurisdiction."

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In *United Mine Workers v. Gibbs, supra,* 383 U.S. 715, this Court held that federal courts have pendent jurisdiction over state claims that derive from a "common nucleus of operative fact" with a federal claim. 383 U.S. at 725. The federal courts, it was noted, have judicial power to consider both claims if the plaintiff "would ordinarily be expected to try them all in one judicial proceeding, . . . as-

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The question presented in the petition might also arise where removal is predicated on the "act" of a federal officer within the meaning of 28 U.S.C. § 1442, since it is not clear whether the remand provision in section 1441(c) applies in such cases. The remand issue in this context is presented in *National Audubon Society v. Department of Water and Power of Los Angeles (DWP),* Nos. 85-2046, 85-2105, 85-2236, 85-2337, and 85-2238, now pending in the Ninth Circuit Court of Appeals. There, the plaintiffs filed an action in state court, alleging that DWP's diversions of water from Mono Lake violate California's public trust doctrine. DWP filed a cross-complaint against several competing water claimants, including the United States, and the United States then removed the case to the federal courts under 28 U.S.C. § 1442. DWP amended its cross-complaint to delete the removal claim, and the plaintiffs amended their complaint to add a new federal law claim based on the federal common law of nuisance. The district court refused to remand the case by reason of DWP's deletion of the removable claim, reasoning that the plaintiffs' new federal law claim provided an independent basis for federal jurisdiction. Subsequently, however, the district court decided to remand the pendent state claims—which raise significant, unprecedented questions concerning the application of public trust principles in the water law context—to obtain a "surer-footed reading" of state law, as authorized under *Gibbs.* The plaintiffs appealed to the Ninth Circuit, asserting that the district court lacked authority to remand the public trust issues to the state courts, and the appeal is now pending.

The question presented in the petition does not properly arise in this case because the case was improperly removed to the federal courts under section 1441(c), and also because that provision authorizes the district court to remand the case to the state courts.

suming substantiality of the federal issues . . . ." *Id.* The Court, however, distinguished between federal judicial *power* and its *exercise*. Although federal courts may have power to determine pendent state claims, the courts should decline to exercise this power if such exercise is not supported by interests of "judicial economy, convenience, and fairness to litigants . . . ." *Id.* As a matter of both "comity" and "justice," the federal courts should allow state courts to exercise jurisdiction over state claims where necessary to obtain "a surer-footed reading of applicable law." *Id.* In particular, "if the federal claims are dismissed before trial, . . . the state claims should be dismissed as well." *Id.*

If the federal courts have authority to remand pendent jurisdiction claims in actions brought under their original jurisdiction, they should have equivalent authority to remand such claims in cases removed from the state courts. Otherwise, federal jurisdiction would depend, fortuitously, on whether the case is a removal case or an original case. There is no logical basis for distinguishing between federal jurisdiction in such cases. Indeed, such a distinction would create an ~~anomaly in~~ federal jurisdiction over pendent state claims. The interests of "comity" and "justice" cited in *Gibbs* apply equally in removal cases and original cases. In fact, the case for remand is stronger in cases that originate in state courts rather than federal courts. Therefore, if federal courts can remand cases that arrive through the front door under their original jurisdiction, *a fortiori*, they can remand cases that arrive through the back door by the removal process.

If the result were otherwise, the federal courts would be required to adjudicate issues that, under any reasonable application of the pendent jurisdiction doctrine or abstention doctrine, should be initially resolved in the state courts. Under the pendent jurisdiction doctrine, state claims should be remanded where necessary to obtain a "surer-footed reading of applicable law." *Gibbs*, 383 U.S. at 727. Under the abstention doctrine, federal courts should defer to state courts in cases "presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976), citing *Railroad Comm'n v. Pullman Co.*, 313 U.S. 496 (1941). Similarly, under the abstention doctrine, federal courts should defer to state courts in cases presenting "difficult questions of state law bearing on policy questions of substantial public import whose importance transcends the result in the case then at bar." *Colorado River Water Conservation Dist.*, 424 U.S. at 814, citing *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959). Abstention is particularly appropriate "where the State [has] . . . established its own elaborate review system" governing the matter. *Colorado River Water Conservation Dist.*, 424 U.S. at 815, citing *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).[8] If the federal courts cannot remand pendent state claims in *removal* cases, they would apparently be powerless to remand even where necessary to obtain a "surer-footed reading" of state law, as in *Gibbs;* or where a federal constitutional claim might become moot pending determination of the state law issues, as in *Pullman;* or where the case presents "difficult questions of state law bearing on policy problems of substantial public import," as in *Thibodaux;* or where the state has established "its own elaborate review system," as in *Burford.* Under any reasonable sense of judicial comity, the federal courts should defer to state courts in adjudicating such issues, whether the issues arise in original cases or removal cases.[9]

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[8] In *Colorado River Water Conservation District*, this Court held that, even where the abstention doctrine does not apply, federal courts should remand cases to state courts in the interests of "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation," 424 U.S. at 817, and in particular that remand is appropriate where necessary to avoid "piecemeal adjudication of water rights in a river system." 424 U.S. at 819.

In original cases, remand of state claims on pendent jurisdiction or abstention grounds can be accomplished in various ways. In *Gibbs* and *Burford,* this Court held that the district court could properly dismiss the action so that a new action could be commenced in the state courts. In *Pullman* and *Thibodaux,* this Court held that the district court could properly stay further proceedings so that a new action could be commenced in the state courts. In *Colorado River Water Conservation District,* this Court held that the district court could properly stay further proceedings so that a parallel state action—already commenced and underway—could go forward. Thus, in original actions, this Court has generally accomplished remand either by dismissing or staying the federal action. The appropriate method of remand depends on the discretion of the district court, taking into account the interests of comity and justice that support the remand.

By the same token, the discretion of federal courts to accomplish remand of pendent state claims in *removal* cases includes the option of directly remanding the case to the state court whence the action was removed. Unlike original cases, removal cases have already been filed in a state court; therefore, the most efficacious way of accomplishing remand is to simply remand the case back to the state court. The federal courts' inherent power to administer their jurisdiction—which underlies their authority to dismiss or stay original federal cases involving pendent state claims—encompasses the authority to directly remand pendent state claims in removal cases, since such claims can be conveniently remanded to the state court in which the case originated. Since Article III of the U.S. Constitution precludes federal jurisdiction over cases lacking either a federal question or diversity of citizenship, this provision supports a federal judicial power to directly remand removal cases to state courts that lack either basis of federal jurisdiction.

The petitioners argue that, since the removal statutes authorize remand of some cases but not others, Congress did not intend to authorize remand of cases not expressly enumerated. In our view, section 1441(c), which authorizes the district court in its "discretion" to remand issues "not otherwise within its original jurisdiction," 28 U.S.C. § 1441(c), authorizes remand of *any* state law issue in *any* removal case, since such an issue is "not otherwise within its original jurisdiction." Assuming *arguendo* that this argument is not correct, we believe that Congress, by spelling out the grounds for remand in some situations, did not intend to preclude remand in situations involving traditional interests of judicial administration, as where the head of federal jurisdiction has disappeared from the case. Indeed, section 1441 (c), in providing for remand of matters "not otherwise within its [the federal court's] original jurisdiction," appears to clearly evince an intent to allow federal courts to remand *all* pendent state claims to state courts, and is thus not inconsistent with the view that the federal courts can remand such claims in the interests of judicial administration.

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[9] Examples of the necessity to apply abstention and pendent jurisdiction principles in removal cases are found in *Naylor v. Case & McGrath, Inc.,* 585 F.2d 557 (2d Cir. 1978), and *Fox v. Curtis,* 712 F.2d 84 (4th Cir. 1983). In *Naylor,* which was a removal case, the Second Circuit abstained from considering the effect of Connecticut's newly-enacted Unfair Trade Practices Act, because the construction of the act by the state court "'might avoid in whole or in part the necessity for federal constitutional adjudication,'" 585 F.2d at 564, and because of the need to obtain "an authoritative and uniform rule of law. . . ." *Id.* at 565. In *Fox,* which was also a removal case, the Fourth Circuit held that the district court had authority under *Gibbs* to remand a pendent state law claim because "state law on the subject was then and remains exceedingly difficult and unclear." 712 F.2d at 89.

This Court has not adopted the petitioners' narrow interpretation of federal judicial power in other cases involving federal jurisdiction. For instance, a federal statute expressly provides for federal "original jurisdiction over all civil actions arising under the Constitution, laws or treaties of the United States," 28 U.S.C. § 1331, and does not suggest that such federal claims should not be adjudicated by federal courts in which they are brought. Nonetheless, this Court has, in the exercise of judicial administration, held that federal claims brought under section 1331 can be dismissed in pendent jurisdiction cases, where the state claims "substantially predominate" or where the federal claim is "not substantial." *Gibbs,* 383 U.S. at 726. If the federal courts can dismiss *federal* claims properly brought under their original jurisdiction, *a fortiori,* they can directly remand *state* claims to state courts in cases utterly devoid of any federal question, as here. If the interests of federal judicial administration support the first disposition, the same interests support the second. If the absence of express statutory authority does not bar the first result, it does not bar the second. Congress no more intended to preclude direct remand of pendent *state* claims in removal cases—particularly where the head of federal jurisdiction has disappeared—than it intended to preclude dismissal of non-predominate or non-substantial *federal* claims in original cases, as in *Gibbs.*

The petitioners argue that this Court, in *Thermtron Products, Inc. v. Hermansdorfer, supra,* 423 U.S. 336, held that federal courts lack authority to remand properly removed cases except where the remand is expressly authorized in the removal statutes. In our view, the petitioners have misread *Thermtron.* In *Thermtron,* this Court held that a district court cannot remand a properly removed case on the ground that the federal docket is congested, since this ground is not recognized in the removal statutes. Importantly, a congested federal docket is not a ground for remand under the pendent jurisdiction doctrine applied in *Gibbs.* In *Gibbs,* this Court held that the federal courts could decline to exercise jurisdiction over pendent state claims "as a matter of comity and to promote justice between the parties, by procuring for them a "surer-footed reading of applicable law." *Gibbs,* 383 U.S. at 726. In particular, the Court noted that "if the federal claims are dismissed before trial, . . . the state claims should be dismissed as well." *Id.*

Thermtron did not suggest that a federal court cannot remand a removal case to obtain a "surer-footed reading" of state law, as authorized in *Gibbs*. Indeed, *Thermtron* did not even involve the pendent jurisdiction doctrine applied in *Gibbs*, and did not even mention *Gibbs*. In this case, unlike *Thermtron*, the district court had undoubted authority *not* to hear the case, pursuant to the pendent jurisdiction doctrine applied in *Gibbs*. If the interests of judicial administration allow the district court not to hear the case, the same interests allow the court to remand the case to the state court in which the case was originally filed. Nothing in the removal statutes suggests that Congress meant to constrain the inherent power of federal courts to remand cases in the interests of judicial administration, particularly where the head of federal jurisdiction has disappeared.

Importantly, a direct remand of a removal case may often serve the principles of comity and justice that underlie the pendent jurisdiction and abstention doctrines. If, for example, a federal court were to *dismiss* a removal action involving pendent state claims, the plaintiff may not be able to bring a new action in the state courts if the action is barred by the state statute of limitations.[10] In

that event, the federal court may be required to adjudicate the state claims for the reason that they cannot be adjudicated elsewhere. Indeed, this scenario may occur even where the state claim involves important and complex issues that, under the abstention doctrine, should be initially adjudicated in the state courts. The problem would not arise, however, if the federal courts can directly remand pendent state claims in removal cases to state courts. Thus, the interests of comity and justice that underlie pendent jurisdiction and abstention principles strongly support direct remand of state claims in removal cases, particularly where the head of federal jurisdiction has disappeared.

Finally, the petitioners argue that litigants may be able to "manipulate" the forum if they are able to obtain remand by deleting removal claims from their com-

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[10] On the other hand, many jurisdictions have adopted the equitable tolling doctrine, which provides that state courts have an equitable power to toll the limitations period "to serve the ends of justice," and particularly where an action was improperly filed in and dismissed by a federal court. See *Addison v. California*, 21 Cal.3d 313, 318-319 (1978); *Bollinger v. National Fire Insurance Co.*, 25 Cal.2d 399 (1944); *Elkins v. Derby*, 12 Cal.3d 410 (1974). Indeed, in *Addison*, the California Supreme Court

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applied this doctrine in allowing a party to initiate a tort action in state court after the limitations period had expired, where the action had been originally brought in a federal court and dismissed for lack of jurisdiction. According to *Addison*, the doctrine applies if timely notice has been provided, the defendant is not unfairly prejudiced, and the plaintiff has acted reasonably and in good faith. *Addison*, 21 Cal.3d at 317.

The equitable tolling doctrine appears to be codified in the laws of Pennsylvania, which govern the plaintiffs' claim here. Under Pennsylvania law, a case timely but improperly filed in one court may be transferred to the proper court. 42 Pa. Const. Stat. § 5103(b). In *Weaver v. Marine Bank*, 683 F.2d 744 (3d Cir. 1982), the Third Circuit recently held that this statute authorizes transfer of a case from a federal court to the state courts, where the case was timely brought in the federal courts but was dismissed for lack of jurisdiction. The Third Circuit noted that "[t]his provision clearly obviates the limitations problem that might otherwise confront the plaintiffs." 683 F.2d at 746.

plaints.[11] Under section 1441(c), however, the district court can consider any manipulative tactics in exercising its "discretion" to remand the case. More importantly, the interests of "comity" and "justice" that, under *Gibbs,* support remand of pendent state claims may outweigh any manipulative concerns. Assume, for example, that a properly removed case presents issues arising solely under state law, and that the state law issues are important and complex. Under these circumstances, a district court may properly wish to obtain a "surer-footed reading" of state law irrespective of whether a litigant has amended its pleading to regain a state forum. Indeed, the pleading amendment may be entirely immaterial in the district court's determination to obtain a more accurate reading of state law. Under the petitioner's view, the district court would be unable to remand the case—

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[11] The petitioners' fear of manipulation appears to be exaggerated. In the present case, the plaintiffs have already selected a state forum in which to present their case, an option that clearly belongs to them. The defendants, in turn, have chosen to remove the case on the basis of a single federal claim. Assuming *arguendo* that the removal was proper, the defendants have the right to "manipulate" the forum as much as the plaintiffs, because the removal statutes provide that a removable case "may," not must, be removed at the option of the defendant. 28 U.S.C. §§ 1441(a), 1441(c). The plaintiffs, in turn, can regain their original state forum only by surrendering their removal claim, a concession that works to the defendants' advantage. It is doubtful that plaintiffs would surrender a removal claim to regain a state forum unless the removal claim provides an incidental rather than primary ground for relief, and the interest of comity suggests that federal courts should hesitate to exercise jurisdiction over such cases. In any event, the defendants have the right to "manipulate" the forum as much as the plaintiffs, and the plaintiffs must pay a higher price than the defendants—by deleting part of their claim—in exercising this tactic.

not matter how much the issues cry out for initial determination by the state courts—because of the fortuity that the plaintiff deleted the removal claim from his pleading. The proper way to balance the interests of comity and justice that support remand against the interests that support the opposite approach, is for district courts to have discretion to weigh these competing factors in determining whether to remand the case. If the balance of interests supports the remand, the district court should have authority to directly remand the case in the interests of judicial administration, pursuant to the pendent jurisdiction principles spelled out in *Gibbs.*[12]

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[12] Most federal appellate courts that have considered the matter have held that district courts have discretion to remand properly removed cases involving pendent state law issues. See *In re Romulus Community Schools,* 729 F.2d 432, 435-440 (6th Cir. 1984); *Murphy v. Kodz,* 351 F.2d 163 (9th Cir. 1965); *Naylor v. Case & McGrath, Inc.*, 585 F.2d 557, 561-565 (2d Cir. 1978); *Fox v. Curtis,* 712 F.2d 84, 89-90 (4th Cir. 1983); *Till v. Unifirst Federal Savings & Loan Ass'n,* 653 F.2d 152, 161-162 (5th Cir. 1981); *Hofbauer v. Northwestern Nat. Bank,* 700 F.2d 1197, 1201 (8th Cir. 1983).

Some federal appellate courts, however, have held that district courts lack authority to remand such cases. See *Cook v. Weber,* 698 F.2d 907, 909 (7th Cir. 1983); *Ryan v. State Board of Elections,* 661 F.2d 1130, 1133-1134 (7th Cir. 1981); *Sheet Metal Workers International Ass'n v. Seay,* 693 F.2d 1000, 1002-1006 (10th Cir. 1982), *modified on other grounds on rehearing,* 696 F.2d 780 (10th Cir. 1983).

In *In re Greyhound Lines, Inc.*, 598 F.2d 883 (5th Cir. 1979), the Fifth Circuit held that such remands are not authorized, but in a subsequent case appeared to adopt the opposite view. See *IMFC Professional Services v. Latin American Home Health, Inc.*, 676 F.2d 152, 160 (5th Cir. 1982).

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court affirm the decision of the Court of Appeals below.

DATED: June 19, 1987

Respectfully submitted,

STATE OF CALIFORNIA
JOHN K. VAN DE KAMP
Attorney General of California
R. H. CONNETT
Assistant Attorney General
RODERICK E. WALSTON*
Deputy Attorney General

* Counsel of Record

(Other states and counsel listed on following page)

STATE OF ALABAMA
DON SIEGELMAN
Attorney General of Alabama

STATE OF ALASKA
GRACE BERG SCHAIBLE
Attorney General of Alaska

STATE OF ARKANSAS
JOHN STEVEN CLARK
Attorney General of Arkansas

STATE OF HAWAII
WARREN PRICE, III
Attorney General of Hawaii

STATE OF IDAHO
JAMES T. JONES
Attorney General of Idaho

STATE OF INDIANA
LINLEY E. PEARSON
Attorney General of Indiana

STATE OF KENTUCKY
DAVID L. ARMSTRONG
Attorney General of Kentucky

STATE OF LOUISIANA
WILLIAM J. GUSTE, JR.
Attorney General of Louisiana

STATE OF NEVADA
BRIAN McKAY
Attorney General of Nevada

STATE OF NEW MEXICO
HAL STRATTON
Attorney General of New Mexico

STATE OF OHIO
ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

STATE OF SOUTH DAKOTA
ROGER A. TELLINGHUISEN
Attorney General of South Dakota

STATE OF TENNESSEE
W. J. MICHAEL CODY
Attorney General of Tennessee

STATE OF TEXAS
JIM MATTOX
Attorney General of Texas

STATE OF UTAH
DAVID L. WILKINSON
Attorney General of Utah

STATE OF WASHINGTON
KENNETH O. EIKENBERRY
Attorney General of Washington

STATE OF WISCONSIN
DONALD J. HANAWAY
Attorney General of Wisconsin

Attorneys for Amici Curiae

AMICUS CURIAE

BRIEF

No. 86-1021

In the Supreme Court of the United States

Supreme Court, U.S.
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October Term, 1986

CARNEGIE-MELLON UNIVERSITY
and JOHN KORDESICH,
Petitioners,
v.

HONORABLE MAURICE B. COHILL, JR.
United States District Judge,
Nominal Respondent,

and

WILLIAM BOYLE and CARRIE BOYLE,
Respondents.

Amicus Curiae Brief of the Department of Water and Power of the City of Los Angeles

DEPARTMENT OF WATER AND POWER
CITY OF LOS ANGELES,
LOS ANGELES, CALIFORNIA
JAMES K. HAHN, City Attorney
EDWARD C. FARRELL, Chief Assistant
City Attorney for Water and Power
KENNETH W. DOWNEY, Assistant City
Attorney
111 North Hope Street
P.O. Box 111
Los Angeles, California 90051
Telephone: (213) 481-6362

KRONICK, MOSKOVITZ,
TIEDEMANN & GIRARD
A Professional Corporation
*ADOLPH MOSKOVITZ
JANET K. GOLDSMITH
ANDREA M. MILLER
770 L Street, Suite 1200
Sacramento, California 95814
Telephone: (916) 444-8920

**Counsel of Record for Amicus Curiae*

Counsel for Amicus Curiae Department of Water and Power

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No. 86-1021

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and

WILLIAM BOYLE and CARRIE BOYLE
Respondents.

Amicus Curiae Brief of the Department of Water and Power, City of Los Angeles, Los Angeles, California

Amicus Curiae seeks to file this brief in support of respondents pursuant to Supreme Court Rule 36, which permits such filing when the parties have consented. Written consent of both Petitioners and Respondents is served and filed herewith.

I

INTEREST OF AMICUS CURIAE

Amicus has an important interest in this controversy insofar as it is respondent in an appeal pending in the United States Court of Appeals for the Ninth Circuit, *National Audubon Society* v. *Department of Water and Power,* Appeal Numbers 85-2046, 85-2105, 85-2236, 85-2237, 85-2238, in which the identical issue--the power of a district court to remand pendent state law issues to state courts in removal cases--is central. All briefing for that appeal was completed in February, 1986, and the matter was argued orally more than a year ago. Although the parties have requested expeditious resolution, the appellate court appears to be awaiting this Court's decision in the instant matter before acting. The factual underpinning of the *Audubon* case edifies the basis for the appellate court's reluctance to act absent guidance from this court.

In May of 1979 National Audubon Society filed an action seeking to prevent continued diversions of water from streams flowing into California's Mono Lake by defendant Department of Water and Power, of the city of Los Angeles,

Los Angeles, California, although these diversions were effected pursuant to permits issued by the State. All of the causes of action asserted by the Society were grounded solely in state law. After initial state court litigation was com-pleted, the Department was granted leave to file a cross-com-plaint to which the United States became a third-party defen-dant. This action lead to removal of the entire case pursuant to 28 U.S.C. Section 1442(a) (1) by the federal defendant. The Department thereafter dismissed the cause of action upon which the removal was based and sought remand of the remainder of the action. The district court did not remand, however, instead permitting plaintiff to amend its complaint to allege a claim grounded in federal law. After reference to the State Supreme Court, which resulted in the articulation of the state's power and responsibility to revisit water allocation decisions based upon concerns emanating from the public trust doctrine extant in this state, *see National Audubon Society* v. *Superior Court,* 33 Cal.3d 419, 447-448 (1983), the federal district court thereafter, consistent with this Court's decision in *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715 (1966), acted pursuant to its discretion to refuse to exercise its jurisdiction over the state claims pendent to the federal claim and, in light of the critical importance of those claims to the State of California, severed and remanded them to state court to assure the parties a "surer-footed reading of applicable law." *Id.* at 726. The above-referenced appeal followed.

The similarities between the *Audubon* v. *Department of Water and Power, supra,* facts and those of the instant action are striking. Here, plaintiffs William and Carrie Boyle sued Carnegie-Mellon University and John Kordesich for damages alleged to have resulted from the unlawful termination of William's employment. The bulk of plaintiffs' complaint was grounded solely in state law, but a reference to the federal Age Discrimination in Employment Act as a potential ground for recovery lead to removal of the action by Carnegie-Mellon. Petition for Certiorari, Appendix B at 5a. After discovery plaintiffs-respondents moved to amend their complaint to delete several claims, including that predicated upon age discrimination, and sought remand of the action to state court. *Id.* at 5a-6a. The district court acceded to remand by exercising its discretion to decline to exercise jurisdiction over the remaining, exclusively state claims, Petition for Certiorari at 7, App. F at 31a-32a, even while acknowledging that the strong implication of *Thermtron Products, Inc.* v. *Hermansdorfer,* 423 U.S. 366 (1976), was that district courts may not remand absent express statutory authority. Petition for Certiorari at App. F at 33a. On mandamus, the Third Circuit Court of Appeals, after a rehearing in banc following reversal by a panel of that court, divided evenly on the issue. This action followed. *Id.* at 9.

In its Petition for Certiorari, Carnegie-Mellon asserted that a fair reading of *Thermtron* leads to the ultimate conclusion that there is no power in the federal courts to remand removed cases to the state courts absent a finding of either lack of jurisdiction at the time of removal or improvidence in the procedure under which the removal was effected.[1] *Id.* at 15

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[1] Appellant Audubon in *Audubon* v. *Department of Water and Power, supra,* concurs with this reading of *Thermtron,* and has suggested that the only option open to a federal district court which finds itself faced with solely state law pendent claims is either to exercise that prudential jurisdiction or to dismiss the action entirely pursuant to *United Mine Workers of America* v. *Gibbs,* 383 U.S. 715 (1966). Thus, both Carnegie-Mellon and the National Audubon Society would have remand unavailable as an option in a removed case absent a statutory deficiency existent at the moment of removal.

Amicus Curiae will demonstrate in this brief that such a holding threatens to destroy a carefully crafted body of jurisprudence grounded upon the principles of comity and "Our Federalism."

II

SUMMARY OF ARGUMENT

The exercise of pendent jurisdiction by federal courts has always been a matter of discretion. *United Mine Workers of America* v. *Gibbs,* 383 U.S. 715 (1966). Since this Court's decision in *Thermtron Products, Inc.* v. *Hermansdorfer,* 423 U.S. 366 (1976), however, some federal Circuit Courts have questioned the ability of district court judges to decline to exercise such jurisdiction by remanding pendent claims lying in the court by way of removal. In this brief, Amicus Curiae will argue that the power to remand pendent state claims must be firmly established to avoid untoward interference with the processes of state courts and to assure fulfillment of this Court's direction to pay deference to the concept of "Our Federalism" embodied in such decisions as *Younger* v. *Harris,* 401 U.S. 37 (1971) and *Railroad Comm'n of Tex.* v. *Pullman Co.,* 312 U.S. 496 (1941).

The result of this argument will be to demonstrate that to deny district courts the power to remand in circumstances such as those extant in the instant case will create inherent prejudice to state court proceedings through the delay and procedural duplication engendered by requiring reinitiation of an action over which that court had proper jurisdiction in the first instance.

III

ARGUMENT

A. INTRODUCTION

The district court's determination below to remand relied principally upon this Court's decision in *United Mine Workers of America* v. *Gibbs,* 383 U.S. 715 (1966). *Gibbs,* an original jurisdiction case, involved a situation wherein the plaintiffs alleged a single factual basis for relief under both federal and state law. Thus the district court acquired jurisdiction pursuant to a complaint filed there in the first instance that contained an adequately pleaded federal claim. The additional power to hear the factually related state claims over which it had no original jurisdiction emanated from the doctrine of pendent jurisdiction. *Id.* at 725. The court made clear, however, that although the doctrine of pendent jurisdiction gives the court power to entertain a claim which could not otherwise be heard, it "is a doctrine of discretion, not of plaintiff's right." *Id.* at 726. In exercising that power, the Court emphasized that:

> Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not substantial in a jurisdictional sense, the state claims should be dismissed as well. Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals.

Id. at 726-727 (footnotes omitted). *Gibbs* further determined that the court's responsibility to review to determine the nature of the claims which predominate, state or federal, continues throughout the course of the litigation and dismissal remains appropriate at any time that that continuing examination reveals

the federal issues to be no more than an "appendage" to predominant state claims. *Id.* at 727.

The trial court in both this case and *Audubon* v. *Department of Water and Power* were faced with exactly the situation anticipated by the *Gibbs* Court, but in the context of an action that reached those courts through removal rather than as original filings. Here, after removal had been properly effected, the federal jurisdictional base completely disappeared, while in *Audubon* v. *Department of Water and Power* the state issues were determinated to predominate both in gravity and scope. The sole departure from the teaching of *Gibbs* in both situations was that the trial judges chose to exercise their discretion to avoid an unnecessary imposition of federal jurisdiction by remanding the matters to state court rather than by dismissing the action entirely, thereby requiring the parties to begin the action in state court anew.

Appellants Carnegie-Mellon University and John Kordesich [hereinafter "Carnegie-Mellon" or "appellant"] clearly disclosed in their Petition for Writ of Certiorari, albeit unintentionally, the gravity of the jurisdictional conundrum created by the breadth of interpretation that has been given this

Court's opinion in *Thermtron Products, Inc.* v. *Hermansdorfer,* 423 U.S. 336 (1976).[2] Arguably, this Court intended to do nothing more in *Thermtron* than to make clear the reviewability of remand Orders the basis for which was neither the improvidence of the removal itself nor the absence of a federal jurisdictional basis for retention of the case once it was correctly removed. Several subsequent lower court decisions have, however, found *Thermtron* to be equally dispositive of the merits of remand questions, holding that prudential and/or discretionary decisions to remand are, in all circumstances, improper. It is this implication of the matter pending before this Court that Amicus Curiae seeks to address.

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[2] The issue raised by Carnegie-Mellon is:

> Whether a district court has authority to remand a properly removed case to state court for a reason not set forth in 28 U.S.C. § 1447(c)--i.e., elimination, by amendment of the complaint, of the federal claim that had formed the basis for removal--a question as to which the circuits are split and as to which the appellate court below, sitting in banc, was evenly divided.

Petition for Certiorari at i.

It is the contention of Amicus Curiae that for this Court to answer the question posed by Carnegie-Mellon in the negative would result in the absolute insulation of actions that reach federal courts by way of removal from any meaningful application of jurisprudential doctrines essential to the proper operation of the federal courts.

B. THE CONCEPTS OF COMITY AND "OUR FEDERALISM" ARE ESSENTIAL ELEMENTS OF FEDERAL JURISPRUDENCE

In *Younger* v. *Harris,* 401 U.S. 37 (1971), this Court articulated the historic desire of Congress "to permit state courts to try state cases free from interference by federal courts." 401 U.S. at 43. This desire was said to stem from congressional recognition that the federal government will fare best if "the States and their institutions are left free to perform their separate functions in their separate ways," thereby honoring the principle of comity. *Id.* at 44. Federal courts were thus placed on notice that, at least in the context of state criminal prosecutions, they were to refrain from" unduly interfer[ing] with the legitimate activities of the States "even though federal rights and interests might be implicated in those insulated activities by excercising their power to abstain. *Id.* This overriding principle, denominated by the Court as "Our Federalism," thus disallows federal courts from interrupting state court proceedings through the exercise of otherwise proper federal jurisdiction.

On the civil, as opposed to the criminal, side of the courts, a parallel doctrine of abstention developed to service the "Our Federalism" interest. This Court, in *Railroad Commission of Texas* v. *Pullman Co.,* 312 U.S. 496 (1941), counseled district courts faced with federal constitutional issues to which unsettled and potentially dispositive state claims were pendent, to "exercise its wide discretion by staying its hands," thereby encouraging the parties to resolve the underlying state issue in the state forum. *Id.* at 501. Such an alternative was devised to avoid needless friction with state policies, thus promoting the interests of comity. The only measurable difference between the *Younger* and *Pullman* doctrines is that the former requires dismissal of the intrusive federal action while the latter permits mere arrest of its progress.

In the years following these two landmark cases, both abstention theories expanded to require federal courts to defer to state proceedings in an ever-growing set of permutations. Flowing from *Younger* were *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975) (disallowing even indirect disruption of state criminal adjudications), *Juidice* v. *Vail,* 430 U.S. 327 (1977) (disallowing interference with state criminal enforcement proceedings so long as federal issues were preserved for adjudication), *Trainor* v. *Hernandez,* 431 U.S. 434, 440 (1977) (no federal action if the same issues are "or apparently soon will be pending in state court"), *Middlesex County Ethics Committee* v. *Garden State Bar Ass'n,* 457 U.S. 423 (1982) (state administrative proceedings "judicial in nature" entitled to deference), and *Ohio Civil Rights Comm'n* v. *Dayton Christian Schools, Inc.*, __ U.S. __, 106 S.Ct. 2718 (1986) (implication of an "important state interest" sufficient to trigger necessity for *Younger* abstention).

From *Pullman* came *Kaiser Steel Corp.* v. *W.S. Ranch Co.*, 391 U.S. 593 (1968) (stay required where state law issue is both novel and of vital local concern), *Reetz* v. *Bozanich,* 397 U.S. 82 (1970) (stay required where issue is novel, vital to state, and its resolution is likely to render federal constitutional construction unnecessary), *Lake Carriers' Association* v. *MacMullan,* 406 U.S. 498 (1972) (abstain if resolution of ambiguities in state law "may" affect federal issues); *see also Bellotti* v. *Baird,* 428 U.S. 132 (1976), and *Colorado River Water Conservation Dist.* v. *United States,* 424 U.S. 800, 814 (1976) ("It is enough that exercise of federal review . . . would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern").

Through these burgeoning doctrinal trends this Court has sought to imbue in the lower courts the requisite respect for their sister state courts as a means of protecting the federalist form of government. To date, however, this body of prudential court administrative doctrine has been applied universally only in those matters that arise in the federal court system in the first instance. This Court should take the present opportunity to vindicate fully the concept of "Our Federalism" by directing the lower courts to honor it in the context of cases arising in and removed from the state courts

as well as those over which they exercise original jurisdiction.

C. ACKNOWLEDGMENT OF "OUR FEDERALISM" IS EVEN MORE ESSENTIAL IN THE CONTEXT OF REMOVAL THAN ORIGINAL JURISDICTION

As Amicus Curiae has demonstrated above, the major purpose underlying both *Gibbs* and *Younger* declinations to exercise jurisdiction emanate from a desire to protect and preserve the federal system by assuring deference to parallel state judicial systems. Acknowledgement and realization of this goal are of even greater importance in the context of cases that reach the federal courts as a consequence of removal than in those which originate there in the first instance.

Pursuant to Title 28 of the United States Code, a wide-range of cases over which the state courts hold jurisdiction concurrent with that of the federal courts may be removed to the federal system.[3] In each removal case, of course, related matters the basis for decision of which is state law may accompany the federal issues for determination under an exercise of the court's pendent jurisdiction. Further, once a Petition for Removal is filed, the state court in which the matter lies is instantly divested of jurisdiction to act no matter how unsettled or delicate the state law issues implicated in the action may be. 28 U.S.C. § 1446(e). It is difficult to see how such an instant divestment of jurisdiction could be any less intrusive upon the processes of the state courts than is the type of injunctive action disallowed by either the *Younger* doctrine or the terms of 28 U.S.C. § 2283, the Anti-Injunction Act. Yet the Circuit Courts, as demonstrated in Carnegie-Mellon's Petition for Certiorari, have in some instances treated the issue of remand as wholly outside the ambit of the trial court's discretion. *See, e.g., In re Shell Oil Co.,* 631 F.2d 1156 (5th Cir. Unit A 1980) (remand only if removed improvidently or without jurisdiction); *Cook* v. *Weber,* 698 F.2d 907 (7th Cir. 1983) (remand is limited by statute and therefore not functional equivalent of discretionary dismissal); *Ryan* v. *State Bd. of Elections of State of Ill.,* 661 F.2d 1130 (7th Cir. 1981) (no remand on abstention grounds in light of

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[3] Actions may be removed if resolution of federal rights or interests may provide a basis for relief, 28 U.S.C. § 1441, where federal officers are defendants, 28 U.S.C. § 1442(a)(1), where members of the armed services are sued or prosecuted for acts stemming from that status, 28 U.S.C. § 1442a, where civil rights are implicated, 28 U.S.C. § 1443, and when property interests of the United States are at issue. 28 U.S.C § 1444.

light of holding of *Thermtron*).

The Seventh Circuit Court of Appeals, in *Ryan* v. *State Bd. of Elections of Illinois,* held specifically that abstention, being a judically-created doctrine of discretion, could not provide the basis for a remand to the state court from which it was removed as there was no mention of such grounds in the remand statute, 28 U.S.C. Section 1447(c). 661 F.2d at 1134. That Circuit's follow-on case on the issue, *Cook* v. *Weber,* reinforced the Circuit's position and held that, because there was no discretion to remand, once the court exercised its discretion not to retain pendent jurisidiction over the state claim it had to dismiss the state claim rather than to restore the proper jurisdiction of the state court which had been ousted solely by virtue of the removal. 698 F.2d at 910. It is this stilted application of this Court's decision in *Thermtron* that Amicus urges this Court to disavow.

The approach of the Fifth and Sixth Circuit courts, on the other hand, is more balanced with regard to the interpretation and application of *Thermtron.* In *IMFC Professional Services of Fla., Inc.* v. *Latin American Home Health, Inc.,* 676 F.2d 152 (5th Cir. 1982), the Fifth

Circuit Court of Appeals, considering a situation similar to the one at bar, *i.e.*, where the head of federal jurisdiction had disappeared from the action, ruled that:

> *Thermtron* does not hold . . . that there can never be an element of discretion in the remand process. Rather, discretion to remand is not prohibited by § 1447(c) or *Thermtron* if that discretion is based on clearly articulated authority.

Id. at 159-160 (footnote omitted). Such "clearly articulated authority," the court noted, may be found in the doctrines of discretionary exercise of pendent jurisdiction and abstention. *Id.* at 160.

The Sixth Circuit has stated the principle even more broadly. In *In re Romulus Community Schools,* 729 F.2d 431 (6th Cir. 1984), one appellate panel reasoned that in any case in which the district court would have jurisdiction to dismiss an original claim pursuant to *Gibbs* theory, it should have coextensive authority to remand that claim in an action found in the court solely by way of removal. *Id.* at 436-437. Clearly the *Romulus* Court was influenced by the "Our Federalism" concept in arriving at its decision.

> The federal courts are courts of limited jurisdiction; this principle and proper respect for state courts demand strict adherence to the statutory basis for removal. These considerations however, counsel against such a narrow treatment for remands of cases comprising only state questions of unresolved issues.
>
> . . . .
>
> Indeed, it would be a most unfortunate result if a federal court was [sic] compelled to decide unsettled questions of state law in a case that otherwise could properly be dismissed, simply because the time bar may prevent refiling in state court.

Id. at 439; see also *Naylor* v. *Case and McGrath, Inc.,* 585 F.2d 557 (2d Cir. 1978); *District of Columbia* v. *Merit Systems Protection Bd.,* 762 F.2d 129 (D.C. Cir. 1985).

Amicus suggests that the concerns addressed by these two cases should be the controlling factors in a federal court's decision to retain jurisidiction over pendent state claims in order to assure vindication of the principles underlying the concept of "Our Federalism." Thus, when the court determines that the state claims pendent to a properly removed action bear those characteristics that would require abstention in a case arising in the federal court in the first instance, it should exercise its power to abstain by severing and remanding those claims to state court, thereby reinstating that jurisdiction the state court would have exercised in the first instance but for the removal.

By the same token, if after initial litigation in the federal court, the head of federal jurisdiction upon which the removal was predicated disappears, remand should be the only proper exercise of discretion.[4] Several Circuit Court decisions have so held, either on the theory that the removal is, by the disappearance of the head of federal jurisdiction, rendered improvident, *see, e.g., Hardy* v. *University Interscholastic League,* 759 F.2d 1233 (5th Cir. 1985); *Spencer* v. *New Orleans Levee Bd.,* 737 F.2d 435 (5th Cir. 1984), or on such grounds as "prudence," and "fairness." *See, e.g., Ondis* v. *Barrows,* 538 F.2d 904 (1st Cir. 1976); *Falls River Way Realty* v. *City of Niagara Falls,* 732 F.2d 38 (2d Cir. 1984); *Fox* v. *Custis,* 712 F.2d 84 (4th Cir. 1983); *Till* v. *Unifirst Fed. Sav. & Loan Ass'n,* 653 F.2d 152 (5th Cir. Unit A 1981); *Hofbauer* v. *Northwestern Nat'l Bank of Rochester,* 700 F.2d 1197 (8th Cir. 1983); *Murphy* v. *Kodz,* 351 F.2d 163 (9th Cir. 1965).

Each of these decisions reflects the approach, if not the jurisprudential basis, that this Court has demanded in original jurisdiction situations, *i.e.,* the district courts must take appropriate action to assure that they do not impair the proper activities of state courts. In removal cases, however, the means of assuring that lack of impairment must be slightly different, because of the prejudice inherent in delaying and complicating procedurally the state court's exercise of jurisdiction by requiring the reinitiation of already commenced litigation rather than permitting the prudential return of the previously exercised jurisdiction by remand. In light of the fact that but for the removal the impairment would not have occurred, once the basis for the removal has disappeared, or the court notes the character of the pendent state claims to be such that abstention is required, the action to be taken should be to remand the matter to the state court which was originally ousted of jurisdiction thereby to avoid determining or delaying the determination of an issue more properly handled by that court.

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[4] Several courts have expressed reluctance to remand where the loss of the federal claim is due to the voluntary action of the plaintiff, asserting that this would permit plaintiffs to oust the federal courts of their proper jurisdiction. *See, e.g. Boelens* v. *Redman Homes, Inc.,* 759 F.2d 504 (5th Cir. 1985); *In re Greyhound Lines, Inc.,* 598 F.2d 883 (5th Cir. 1979). Amicus asserts that, consistent with the argument presented in this brief, this issue should be viewed as one within the sound discretion of the trial court as such voluntarism may be the product of discovery, further research, new decisions, and other considerations that minimize or destroy any facial inference of manipulation of federal court jurisdiction. Additionally, the district court may, *sua sponte,* conclude that the pendent state claims are sufficiently sensitive matters to render remand appropriate even though the federal claim is retained for decision, or stayed pending the outcome of state proceedings following severance and remand.

IV

CONCLUSION

Following this Court's decision in *Thermtron Products, Inc.*, v. *Hermansdorfer* 423 U.S. 366 (1976), the federal Circuit Courts developed diverse methods of handling the issue of pendent state claims lying in the federal courts solely because they were appended to properly removed federal claims. In the instant case the Third Circuit Court of Appeals, by an evenly divided in banc decision, permitted the complaint to be remanded to state court once the head of federal jurisdiction was dismissed by the plaintiff. In *Audubon* v. *Department of Water and Power, supra,* the similar case that forms the basis for this Amicus's interest in this issue, the district court remanded on the grounds that the pendent state claims consisted of unsettled issues of state law implicating sensitive state policy matters. Amicus respectfully suggests that both district courts acted not only properly, but in the only manner they could consistent with the body of jurisprudence counseling deference to state court resolution of such issues commonly referred to as the "Our Federalism" doctrine. For this reason Amicus asserts that the Third District Court of Appeals must be affirmed herein, in an opinion that makes clear the applicability of these concepts to removed, as well as to originally filed, federal actions.

Respectfully Submitted,

KRONICK, MOSKOVITZ,
TIEDEMANN & GIRARD
A Professional Corporation
*ADOLPH MOSKOVITZ
JANET K. GOLDSMITH
ANDREA M. MILLER

*Counsel of Record

Attorneys for Department of Water and Power, City of Los Angeles, Los Angeles, California